HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE OF THE HOUSE OF REPRESENTATIVES

ON H. R. 15444

EXTENDING THE TIME FOR CONSTRUCTING A DAM ACROSS RAINY RIVER

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EXTENDING TIME FOR CONSTRUCTION OF A DAM ACROSS RAINY RIVER.

[President's veto of H. R. 15444.]

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Wednesday, April 22, 1908.

Subcommittee: Hon. Frederick C. Stevens (chairman), Hon. John J. Esch, Hon. E. H. Hubbard, Hon. Charles L. Bartlett, and Hon. William Richardson.

STATEMENT OF HON. J. ADAM BEDE, A REPRESENTATIVE FROM THE STATE OF MINNESOTA.

Mr. STEVENS. This hearing is before a subcommittee of the Committee on Interstate and Foreign Commerce to consider the bills authorizing construction of dams in waters in or about the State of Minnesota. The first bill to be considered is H. R. 15444, an act extending the time for the construction of a dam across the Rainy River, Minnesota, upon which the President has sent a veto message to Congress, dated April 13, 1908, as follows:

[Senate Document No. 438, Sixtieth Congress, first session.]

VETO MESSAGE OF THE PRESIDENT.

To the House of Representatives:

I return herewith, without my approval, House bill 15444, to extend the time for the construction of a dam across Rainy River.

This bill is returned for several reasons, some of which are general, others special. In this particular case permission to construct this dam was originally given, as being in Rainy Lake River, by the act of May 4 1898 (30 Stat. 398), which limited the time for commencing the work to one year and for completing it to three years from that date. Further extensions of time were granted as follows: For commencement, three years, and for completion, five years from May 4 1900, by the act of that date (31 Stat., 167); for construction until May 4 1907, by the act of June 28, 1902 (32 Stat., 485); for completion until July 1, 1908, by the act of February 25, 1905 (33 Stat., 814). The act of 1905 substituted the Rainy River Improvement Company for the original permittee. All rights given by these acts will expire July 1, 1908, unless the dam is completed on or before that date. In other words, the permittees will then have enjoyed for more than ten years the exclusive privilege of constructing this work, and have apparently failed to take advantage of it, for this bill would extend the time for three years longer to some unnamed day in July, 1911.

I do not believe that natural resources should be granted and held in an undeveloped condition either for speculative or other reasons. So far as I am aware, there are no assurances that the grantees are in any better condition promptly and properly to utilize this opportunity than they were at the time of the original act, ten years ago.

In all permits of this character the duty of declaring a forfeiture, after notice and hearing, for failure to begin or complete construction within the time limited by the

permit, or for other breach of conditions should be definitely imposed upon the proper administrative officer (in this case the Secretary of War). There have been many unfortunate experiences resulting from conditional grants, which, though on their face apparently terminable for breach of condition, proved practically indeterminate because no one official was specifically given power to discover and declare the breach. The general statute regulating dams in navigable waters (act June 21, 1906, 34 Stat., 386), though representing an advance yet leaves uncertain much that should be definitely expressed in each act permitting the construction of dams under this statute.

A definite time limit is one of these important omissions. The public must retain the control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand. The right reserved by Congress to alter, amend, or repeal is based on this principle; but actual experience of what happens with indeterminate public-utility franchises proves that they are in the vast majority of cases practically pereptual. Each right should be issued to expire on a specified day without further legislative, administrative, or judicial action.

Every permit to construct a dam on a navigable stream should specifically recognize the right of the Government to fix a term for its duration and to impose such charge or charges as may be deemed necessary to protect the present and future interests of the United States in accordance with the act of June 21, 1906. There is sharp conflict of judgment as to whether this general act empowers the War Department to fix a charge and set a time limit. All grounds for such doubt should be removed henceforth by the insertion in every act granting such a permit of words adequate to show that a time limit and a charge to be paid to the Government are among the interests of the United States which should be protected through conditions and stipulations to be imposed either by the War Department or, as I think would be preferable, by the Interior Department.

The provision for a charge is of vital importance. The navigability of every inland waterway, and of all connected and connectable inland waterways as a whole, should be improved for the purposes of interstate and foreign commerce upon a consistent unified plan by which each part should be made to help every other part. One means available for the improvement of navigation at a particular point on any river may be a dam creating a slack-water pool of sufficient depth. Such a dam may, in many cases, develop power of sufficient value to pay in whole or in part for the improvement of navigation at that point, and if there is any surplus it can be spent upon improvements at other points in accordance with the general plan. Since the Government can do by any proper agency what it can do directly, it is in principle immaterial whether this income to construct needed improvements is derived from works constructed directly by the Government or by a corporation acting under Federal authority, since Federal authority is the one indispensable legal prerequisite for the work, though the charge to be paid to the Government for the power would of course differ in the two cases; indeed, the charge would necessarily vary greatly, for where the improvement was both costly and of great benefit to the public, the charge would naturally be made low and the time limit long.

The income derivable from this source would materially aid in the complete improvement of our navigable waters, for which there is now such crying need. The Chief of Engineers of the Army reports that the bills pending at this session of Congress permit the construction of dams in navigable streams capable of developing over 1,300,000 horsepower. These rivers run every hour in the day and every day in the year. To develop this amount of power would, under average conditions, require about 25,000,000 tons of medium-quality coal every year. This natural wealth is the heritage of the people. I see no reason for giving it away, though there is every reason for not imposing conditions so burdensome as to prevent the utilization of the power. The authority to make, modify, or withhold grants manifestly implies both the power of inquiring into the grounds on which the grants are asked and the duty of administering the grants in the public interest.

We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power.

The present policy pursued in making these grants is unwise in giving away the property of the people in the flowing waters to individuals or organizations practically unknown and granting in perpetuity these valuable privileges in advance of the formulation of definite plans as to their use. In some cases the grantees apparently have little or no financial or other ability to utilize the gift, and have sought it merely because it could be had for the asking.

In place of the present haphazard policy of permanently alienating valuable public property we should substitute a definite policy along the following lines:

First. There should be a limited or carefully guarded grant in the nature of an option or opportunity afforded within reasonable time for development of plans and for execution of the project.

Second. Such a grant of concession should be accompanied in the act making the grant by a provision expressly making it the duty of the designated official to annul the grant if the work is not begun or plans are not carried out in accordance with the authority granted.

Third. It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power.

Fourth. There should be a license fee or charge which, though small or normal at the outset, can in the future be adjusted so as to secure a control in the interest of the public.

Fifth. Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at that time.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *April 13, 1908.*

Mr. BEDE. If I may, I will make a brief statement in regard to this matter, and then introduce Mr. Rockwood.

The President in vetoing House bill 15444 certainly believed that this company was merely holding its rights in asking for an extension of time without making any investment. When I saw him personally he gave me to understand that.

Mr. HUBBARD. Before or after the veto?

Mr. BEDE. After the veto. I have here a detailed statement of what has actually been done, which I will file with the reporter.

(Following is the statement referred to:)

WHAT HAS BEEN DONE.

The following work has been completed:

Excavation and masonry for waste way canal gates therein on Canadian side, completed.

Retaining wall on northeast of Canadian waste way canal, completed.

Fore bay wall on southwest side of Canadian waste way canal, completed.

Wheel pits in Canadian power house are constructed above water and ready for draft tubes and cast-iron heads.

Spillway of main dam, Canadian side, completed.

Waste gates connecting spillway with power house, Canadian side, are constructed above water.

Steel columns, girders, etc., for Canadian power house up to the floor of the wheel pit are on the ground.

Rack frames for all Canadian work are on the ground.

Cofferdam below American power house out at the end of power house, completed.

Part of cofferdam above American power house is in place, but not sheeted.

Mr. BEDE. I would merely state that the original bill in regard to this matter was passed in 1898. At that time there was not a railroad within a hundred miles of the falls on the Rainy River. This company owned at that time the riparian rights on the American side, and they then interested themselves in having a railroad put in there in order that they might get supplies and materials for building a dam. They also went to work with the Canadian government to get riparian rights on that side of the river, those lands being Crown lands, and to get permission from Parliament to build the dam, making one dam for the entire river. It took them seven years to get the rights from the Canadian government, and that brought them down to 1905, when they got another extension. The very day that they got the rights from the Canadian government the contractors

began work, and they worked until last fall, when there was some trouble with labor, and I think the contractors were losing money and threw up the contract. Then the panic came, and work has been suspended for several months.

This company has invested about three quarters of a million dollars in this dam, and which of course is of no value unless they shall spend more. They expect to spend $6,000,000 on this plant, the electric plant, the paper mills, and other industrial enterprises. I think it may be said that there are a thousand people there; many of them have invested in homes, and all of that will be lost unless this work goes on. The company owns the riparian rights on both sides of the river, and it is my understanding that the Federal Government has no interest whatever, aside from the easement for navigation purposes; that it is in the riparian owners, and in the State of Minnesota, if in anybody. I think the recent decision in the case brought from the Soo, a day or two ago, by the Federal Supreme Court, fully settles the point, and the Members who are lawyers will understand that better than I can. I think there is no doubt but that if the panic and the labor troubles of last fall had not occurred that this dam could have been completed before the expiration of the time granted, which extended to July 1, 1908.

Mr. ESCH. What is the extent of the improvements to date?

Mr. BEDE. We have here photographs, which I will file with the committee, which will show the state of construction. The company owns the riparian rights on both sides, but they are not the "dog in the manger" trying to keep anybody out; nobody else could go on and build if they were prohibited from doing it. If our Government puts burdens on this company, no one knows what the Canadian government may do on that side, and you can not get capital under those circumstances. It seems to me you should not put a burden on any company which goes that distance into the backwoods with the intention of developing a plant. They are putting in a paper plant; they will employ a large number of laborers; they will build up a city, deliver their electric power, and add a great deal to the development of northern Minnesota. There was no railroad in there until 1901, and that was on the Canadian side, so that it did not afford them very good facilities for bringing in material. There was no railroad on our side of the river until last November, so that you can readily understand from these facts that the company has absolutely kept faith with the Government, and are merely asking permission to develop their own property in a way that will not interfere with navigation.

I will now introduce to the committee Mr. Chelsea J. Rockwood, of Minneapolis, Minn., representing the Rainy River Improvement Company.

STATEMENT OF MR. CHELSEA J. ROCKWOOD, OF MINNEAPOLIS, MINN., REPRESENTING THE RAINY RIVER IMPROVEMENT COMPANY.

Mr. ROCKWOOD. Mr. Chairman and gentlemen, I represent the Rainy River Improvement Company named in this bill. I am secretary of the company and also attorney for the company.

In addition to what Congressman Bede has said as to the physical situation, I want to add this: Rainy River is, of course, on the bound-

ary, and it is a considerable stream. Its source is Rainy Lake, about 2½ miles east of this point, and its mouth is the Lake of the Woods, which is in the neighborhood of 80 miles west. At this point [indicating] ledges of granite run across the river, making a natural fall of about 23 or 24 feet. Of course, nothing can pass over those falls, and only one man ever went over them and came out alive, and that by a miraculous accident.

Mr. BARTLETT. How high are they?

Mr. ROCKWOOD. About 23 or 24 feet in a distance of about 400 feet.

Mr. BARTLETT. Perpendicular?

Mr. ROCKWOOD. Not perpendicular; no.

Mr. ESCH. They are rapids, not falls?

Mr. ROCKWOOD. There are two principal falls. The water starts in rapids, and then what is really the head of the principal fall is a drop of 10 or 12 feet, then there are rapids and boiling water for two or three hundred feet, and then another drop of 10 or 12 feet.

Mr. BARTLETT. Is it rocky?

Mr. ROCKWOOD. It is a rough granite ledge.

Mr. BARTLETT. Right there, because it has an important bearing, from the legal aspect of the case, has the river ever been navigable up to the falls, and then, by reason of the falls, the transportation discontinued by the river and the freight portaged?

Mr. ROCKWOOD. That has been done.

Mr. BARTLETT. How long ago?

Mr. ROCKWOOD. Two or three hundred years, I think.

Mr. BARTLETT. How long since it has been abandoned?

Mr. ROCKWOOD. It has not been abandoned; there is some navigation yet.

Mr. STEVENS. Will you please state the history of the navigation?

Mr. ROCKWOOD. This waterway has been the main highway from eastern to western Canada from 1650 until the Canadian Pacific road was built, about thirty years ago; and, while the amount of navigation travel was not large in comparison with the travel on some of our water highways, there has been commerce during all that time. Since the Canadian Pacific road was built it has ceased to be a through route, and has been local. In 1901 the Canadian Northern Railroad was built right along parallel with the Rainy River from Lake of the Woods to Rainy Lake, and since that time the amount of commerce has greatly declined except in the running of loose logs—floating logs.

Mr. BARTLETT. But that is not commerce.

Mr. ROCKWOOD. It is not commerce that can be interfered with by anything that may be done. That is the principal use of the stream now.

Mr. HUBBARD. There is no upstream navigation?

Mr. ROCKWOOD. Not past this point. There never has been except by portage; nor downstream excepting by portage.

Mr. BARTLETT. Do you mean by that carried either from one point above to a point below by vehicles; commerce to be carried farther on?

Mr. ROCKWOOD. There are boats on the river both below and above the falls, and everything that is brought up and intended to go on has to be unloaded, carried past these falls, and reloaded. I want to give you all the information I can and am glad to have questions asked.

Mr. BARTLETT. That is an important question from the legal standpoint. Now, can you give me some idea what the extent—I do not mean that you should be exact—but the tonnage of any such commerce. I do not mean in figures, but is it great or small?

Mr. ROCKWOOD. It is small since the Canadian Northern Railroad came in, and is almost wholly Canadian, so far as boats are concerned.

Mr. BARTLETT. You mean to say that it is decreasing?

Mr. ROCKWOOD. It is decreasing.

Mr. STEVENS. Where was the old portage, on the Canadian side or on the American side?

Mr. ROCKWOOD. There were portages on both sides, but the principal portage was on the Canadian side, because there were no American boats, and Canadian boats could not land on the American side. Now, there has been a very small amount of portaging on the American side, an insignificant amount, and it has now practically ceased, if not wholly ceased, since the railroad came in.

Mr. HUBBARD. What is the length of the portage?

Mr. ROCKWOOD. Between five and six hundred feet; maybe a little over.

Mr. HUBBARD. Are there any American boats on the river now from above or below?

Mr. ROCKWOOD. There is one little American boat that did run from International Falls, which is the station on the American side, to a point on the Little Fork River; but it ran first to a little hamlet, and then ran to connect with the railroad that came in there. Now that the railroad has extended through I do not know whether it is doing anything or not.

Mr. HUBBARD. That is the Minnesota and International?

Mr. ROCKWOOD. That is it; that has been extended now to that point. The only American boats that I know of on the lake above the falls are used in towing logs on the lake. They bring the logs down to the head of the river, the mouth of the lake, turn them loose, and let them float in there. At the mouth of Rainy Lake, at the head of this river, are rapids, but the fall is only about 2 feet, but sufficient to make rapids that are difficult and dangerous. The United States deputy collector of customs lost his life there one day last week in trying to pass those rapids in a canoe. This dam will raise the water of the river, and also raise the water of Rainy Lake. It will increase the depth of the river by 6 feet or more above the dam, and increase the level of the lake by 4 feet or more—that is, the entire lake. The lake contains 300 square miles of area.

Mr. HUBBARD. Will that take out this 2 feet of fall?

Mr. ROCKWOOD. Wholly, and leave smooth water. There are 300 square miles of area in Rainy Lake.

Mr. ESCH. That would mean flowage?

Mr. ROCKWOOD. The figures that I have suggested do not mean any flowage above high-water mark, to which we have a right to go. If we flow any more we must settle with the riparian owners, of course, but we can go to that point and keep wholly within our rights.

Now, this dam will serve as a storage reservoir, and the low-water flow of the stream below our dam will be so increased, because of the capacity of this storage reservoir, as to increase the depth of the water in the river below by 1 or 2 feet, so that navigation will

be improved by the construction and operation of the dam both above and below the dam—greatly improved.

Mr. BARTLETT. Then the building of the dam instead of impeding navigation, aids it?

Mr. ROCKWOOD. The greatest possible aid to navigation. It will aid navigation more than either Government is likely to aid it by any engineering work or in any time that can be anticipated.

Mr. BEDE. There is a provision in the original bill for a lock.

Mr. HUBBARD. How would you get along with navigation without a lock?

Mr. BEDE. It is navigable above and below.

Mr. HUBBARD. Do you still contemplate portage?

Mr. ROCKWOOD. Navigation can be carried on in the same way as now.

Mr. BARTLETT. If the Government built locks they would not be in the way?

Mr. ROCKWOOD. This whole matter has been before the Government's War Department engineers in St. Paul, and the engineer in charge, Colonel Derby—he has now retired and Captain Shulz is in his place. Colonel Derby selected a site for a lock, and asked us to cede the land to the Government, and we have offered to do it. The strip of land, 100 or 150 feet wide, is entirely outside of the bed of the stream, and in the location that Colonel Derby selected; and we are ready to deed that land, or such other strip of land as may be finally decided upon to be the best location for the lock, and put the title in the Government, so that it may build the lock at any time when it is found necessary. Further than that, the stream through these rapids is determined in its course and direction by the ridges of granite. One of those runs out into the river near the head of the falls from the American side, and another runs out from the Canadian side, separated from the first by a distance of 100 or 150 feet, and the main current there is between the two and at right angles to the general direction of the stream, from the Canadian shore directly toward the American shore through the gorge.

Mr. HUBBARD. It runs between ridges of granite?

Mr. ROCKWOOD. Yes; and directly at right angles, or substantially so, to the general course of the stream. And then near the American shore it finds an opening again in the lower ridges, and turns down and goes on down to the foot of the falls through such ridges of granite. I will not undertake to describe all that in detail.

Now, if the Government were to put in any lock, it will be necessary not only to excavate through the mainland on the American side a distance of about 200 feet with heavy excavation, but it will be necessary to excavate through this upper ridge of rock that run out from the American toward the Canadian side. In order to develop the power, it is also necessary to excavate the upper ridge of rock, and we are doing that; we are doing that portion as a part of the development of the power, that rock excavation which lies in the upper ridge, and we can not develop the power without.

Mr. BARTLETT. Now, if the Government wants to put a lock there——

Mr. ROCKWOOD. That will save many thousand dollars of expense; I haven't an estimate of the exact amount.

Mr. BARTLETT. But whatever it amounts to it will be ready——

Mr. ROCKWOOD. We will do that in advance. We will deed our strip of land to the Government with the excavation which we make, so that the Government will have the benefit of that. I think it will only amount to about $25,000, so that we do not, as a matter of fact, create any obstruction. We do not put in a pound of material that will ever have to be taken out if the lock is put in.

Mr. HUBBARD. Did I understand you to say that the engineers have reported upon this particular feature?

Mr. ROCKWOOD. Upon this particular feature. I do not know what report you will find in General Mackenzie's office, but they have examined it. Colonel Derby was very familiar with it. Colonel Derby has retired, and his successor, Captain Schulz, is probably not so familiar, but the maps are on file in his office.

Mr. HUBBARD. Where is Captain Schulz located?

Mr. ROCKWOOD. At St. Paul, and has jurisdiction of the whole Minnesota district.

Mr. BARTLETT. Have you investigated the question, and have you any brief on the subject, with reference to the question as to who owns the water?

Mr. ROCKWOOD. I will go to that subject, including the question of international boundary.

We not only do not put in a pound of material that would ever have to be taken out, as far as can be seen, but we do a considerable proportion of work ourselves that the Government would have to do if it put in the lock, and the Government will get the benefit of it. We make the immediate improvements—a vast one, too—so far as there is any navigation at all, by increasing the depth both above and below the falls and wholly wiping out the dangerous rapids at the head of the river.

Mr. HUBBARD. How long is that river?

Mr. ROCKWOOD. Not far from 80 miles long from Rainy Lake to Lake of the Woods.

Mr. HUBBARD. How far from the head of it is your dam?

Mr. ROCKWOOD. From 2 to 2½ miles.

Mr. STEVENS. What work has been done on this dam, in general?

Mr. ROCKWOOD. The contract was let in 1905, and the moment the contract was obtained from the Province of Ontario for the riparian rights on that side work was commenced just as soon as the contractors could ship in their materials and tools, all of which had to come from a distance. The contractors selected their own method of work, and because the railroad was on the Canadian side they found it advantageous to put in their rock crusher, their concrete plant, and so on, on that side and do that portion of the work first, and the greater part of the work that has been done—not all, but the greater part—has been done on the Canadian side.

Now, this statement which has been furnished by Mr. Backus, the president of the company, to Mr. Bede, is this: Excavation and masonry for wasteway canal gates therein on Canadian side completed. Retaining wall on northeast of Canadian wasteway canal completed. Forebay wall on southwest side of Canadian wasteway canal completed. Wheel pits in Canadian power house are constructed above water and ready for draft tubes and cast-iron heads. They are constructed below water also. The wheel pits run down

10 or 15 feet below water, and they are completed up to a level considerably above water.

Mr. STEVENS. Can you tell us about the amount of money that has been expended for the improvements on the Canadian side?

Mr. ROCKWOOD. I do not think I can separate one from the other.

Mr. STEVENS. On the two sides then?

Mr. ROCKWOOD. So far as I know, no separate account has been kept, as it was one piece of work. It is several hundred thousand dollars. I think, in round numbers, about $750,000. I have not the personal knowledge, and I did not stop to get it, to verify those figures as to the dollars and cents.

Mr. STEVENS. I merely wanted the facts in the record.

Mr. HUBBARD. What is the estimated cost of the whole improvement?

Mr. ROCKWOOD. The whole dam and the power houses, which are really part of the dam and can not be separated from it—a good deal more than half of that portion that has already been done; a good deal more than half of the expense of the dam has already been incurred—from $1,000,000 to $1,250,000 to build the dam.

Mr. HUBBARD. Is that the whole of the improvement that your people contemplate?

Mr. ROCKWOOD. It is not. Beyond that they contemplate the completion and the equipment of those power houses with water wheels and electrical and other machinery. The erection at the outset of pulp and paper mills, and with an initial capacity of 175 tons of finished paper per day produced from all of the pulp, all the fiber, all the material.

Mr. STEVENS. On the American side or on the Canadian side?

Mr. ROCKWOOD. The paper will all be manufactured on the American side.

Mr. STEVENS. What will be manufactured on the Canadian side?

Mr. ROCKWOOD. Pulp at the outset. A portion of the pulp will be ground on the Canadian side and transferred and manufactured into paper on the American side.

Mr. STEVENS. Is your corporation an American or a Canadian corporation?

Mr. ROCKWOOD. The Rainy River Improvement Company is a Minnesota corporation, and it let the contract for the dam.

Mr. STEVENS. Where are your stockholders located?

Mr. ROCKWOOD. Wholly in Minnesota.

Mr. STEVENS. Who are they?

Mr. ROCKWOOD. Mr. Backus, Mr. Brooks, Mr. Haw. Those are the principal ones.

Mr. STEVENS. Living in Minneapolis?

Mr. ROCKWOOD. Living in Minneapolis. Mr. Backus has been negotiating for additional capital. I doubt if he has the ready money to complete this whole thing. It will take five or six million dollars to build it.

Mr. HUBBARD. I wish you would give the figures about the capitalization authorized, paid in, and so on, and what securities have been issued.

Mr. ROCKWOOD. Yes.

Mr. BARTLETT. Wouldn't it be well for the gentleman not to give that now, but to make a statement of it and file it?

Mr. ROCKWOOD. Yes; I should have to do that later, but I can state this much——

Mr. STEVENS. I think it is important, as Mr. Hubbard suggests, that an exact statement as to the financial condition should be put in the record, because that has been made a question.

Mr. BARTLETT. This is the point that you have to meet, if you will allow me to make the suggestion: The President says:

> So far as I am aware, there are no assurances that the grantees are in any better condition promptly and properly to utilize this opportunity than they were at the time of the original act, ten years ago.

Mr. BEDE. The President gave me to understand that he did not think they had any investment there whatever; purely a nominal investment.

Mr. ROCKWOOD. I can not, Mr. Chairman, give a complete answer to those questions, for it did not occur to me that the committee would want that information. I can simply say this, however, that the incorporation and organization of companies that will operate this power is in an incomplete state. This Rainy River Improvement Company is an organization with a capital of only $50,000. It has expended many times that amount, and the money has been advanced to the company by Mr. Backus and his associates, and securities have not been issued—that is, they have not been issued representing all the money expended. On the Canadian side the organization went a little further, and bonds were issued, but those bonds have never been sold, excepting possibly a part of them.

Mr. HUBBARD. Is there a different corporation on the Canadian side?

Mr. ROCKWOOD. It was necessarily so, because the Canadian gov ernment required a Canadian corporation there, and a Canadian cor poration did not have the necessary powers to operate on the Minnesota side, so that it was inevitable that there should be two corporations, and they are owned and controlled by precisely the same people.

Mr. HUBBARD. The same interests and the same men?

Mr. ROCKWOOD. Absolutely.

Mr. ESCH. What company is the Koochiching Company?

Mr. ROCKWOOD. The Koochiching Company owned this land ten years ago, and it made an arrangement with Mr. Backus and his associates by which it agreed to deed the water power to secure this improvement. The Koochiching Company retained its land other than that necessary for the improvement of power and manufacturing purposes, 40 or 50 acres, in connection with it; and the Koochiching Company still owns quite a large quantity of their adjacent land.

Mr. STEVENS. I think we can save time if you can prepare and have inserted in the record an authoritative statement from the officers of your company showing these facts: First, the history of the grant; second, the corporate existence on the American side and on the Canadian side; the history of your financial operations; the amount of your expenditures, and a copy of your Canadian grant. We want to know exactly what rights and what equities you have, and what your obligations are in Canada.

Mr. HUBBARD. Are there other companies than these two?

Mr. ROCKWOOD. Only these two.

Mr. RICHARDSON. Do you not think that you ought to show in addition to that, in connection with the President's opposition,

whether there was any contribution made to the Government by this dam company?

Mr. BEDE. This company, as was shown before you came in, Mr. Richardson, have improved navigation above and below the falls.

Mr. RICHARDSON. What horsepower will you develop?

Mr. ROCKWOOD. The entire river will develop about 20,000 horsepower.

Mr. RICHARDSON. Have you got it in complete condition so that you can furnish the electrical energy to be used?

Mr. ROCKWOOD. None of it yet; we have not reached that point.

Mr. RICHARDSON. Do you claim that you improve navigation at the same time that you develop the electrical power?

Mr. ROCKWOOD. Vastly.

Mr. STEVENS. That has all been demonstrated in the record, Mr. Richardson.

Mr. RICHARDSON. Very well.

Mr. ROCKWOOD. Now, I want it particularly understood by the committee that so far as the question of diligence is concerned, we should have been entirely justified if we had not done a stroke of work at all until we had railroad transportation on this side of the river, because without that it was impossible to market a single pound of our product.

Mr. STEVENS. Will you please give us the history of the railroad connection, what railroads went in there, and who owns them?

Mr. ROCKWOOD. When this first grant was made in 1898 there was no railroad in any direction within less than 75 miles as the crow flies. The first railroad reached there in 1901 on the Canadian side, the Canadian Northern Railroad, owned and controlled by Mackenzie and Mann, of Toronto. That was built between Winnipeg and Port Arthur, and it touched this point on the Canadian side; but it did not furnish any aid so far as the operation of any manufacturing enterprise was concerned, because it did not furnish access to the American markets, which were the only possible markets. No other road reached there until November, 1907. In the meantime Mr. Backus and those associated with him were engaged in efforts, costing a great deal of time and some money, to induce railroads to come in.

Mr. STEVENS. What road came in next?

Mr. ROCKWOOD. The Big Fork and International Falls Railway Company, a proprietary line of the Northern Pacific. That line is owned by the Northern Pacific Railroad Company, and it extends from Big Fork River to International Falls, a distance of about 35 miles.

Mr. STEVENS. Are not Mr. Backus and his associates interested in that road also?

Mr. ROCKWOOD. They are not interested in that road. They are minority stockholders in the Minnesota and International Railroad, which extends from Brainerd, Minn., to Big Fork River, and this Big Fork and International Falls Railroad is really an extension of that. But for years Mr. Backus was engaged in an effort to induce the Northern Pacific Railroad Company, which was the majority stockholder of the Minnesota and International Railroad, to extend that line to International Falls. The officers of it said absolutely and positively that they would not extend it, and they would not set any time in the future when they would make that extension—that is, they

could not name any time. In October or November, 1906—and work had been going on on the dam for a year and a half—Mr. Backus and his associates organized a new company and entered into a contract for the building of that 35 miles of road. The contractors were on the ground with their men and equipment and actually commenced grading; and after the work was under way and it was apparent that there was going to be a road there, then the officers of the Northern Pacific sent for Mr. Backus and said, "We have concluded to take over and build that line ourselves;" but they refused to do it in the name of the Minnesota and International and organized a new company, which they own absolutely themselves, and have built the 35 miles. That began operation last December.

Mr. STEVENS. Now, what third line is in there?

Mr. ROCKWOOD. During last season the Duluth, Rainy Lake and Winnipeg Railroad extended its line from Virginia to the boundary, some little distance north of Virginia, which is on the Mesaba Range; and last year it extended its lines, reaching the boundary at the mouth of the lake 2½ miles from our point, getting in there just about the same time that the Northern Pacific did—that is, in November or December of last year. Their road was hastily built, and I do not think they have any regular train service yet, although I am not absolutely sure about that. But the road is there.

Mr. STEVENS. Who owns that railroad?

Mr. ROCKWOOD. A Mr. Cook, of Duluth, is the president, and other lumbermen are interested with him.

Mr. STEVENS. I know who they are, but I wanted it to appear in the record. It is an extension of an old lumber railroad?

Mr. ROCKWOOD. That is what it is. They are gentlemen with whom Mr. Backus or Mr. Brooks have no association, and their line does not yet reach our point. They have built a bridge, which of course Congress granted permission to build, at the head of the Rainy River, and they connect with the Canadian Northern Railroad.

Mr. STEVENS. Have you put in the record exactly what work has been done on the American side, and when it was done?

Mr. ROCKWOOD. I have not done that, excepting to state about the amount of money that has been expended.

Mr. STEVENS. We would like to have this as consecutive as possible. Tell us exactly what work has been done on the American side and when it was done.

Mr. ROCKWOOD. I shall have to ask time to do that.

Mr. STEVENS. It is important that you state that.

Mr. ROCKWOOD. I am not able to do that now.

Mr. STEVENS. In that connection state further, as you have already outlined, why work was done on the Canadian side earlier.

Mr. ROCKWOOD. I can state that now. The contractors, who were McGuire & Penniman, of Providence, R. I., made a contract for the construction of the entire dam. That contract did not limit them to any particular method so far as the construction of one portion or another was concerned, and they found it advantageous to commence on the Canadian side, and that was against our protest. Mr. Backus was very much disappointed when he found that they elected to build the Canadian side first, but they did it, and that is the whole of that.

Mr. STEVENS. Is there anything further that you have to say before we come to the specific points in the veto message?

Mr. ROCKWOOD. I think I have stated the physical situation so far as I can. I will have to get a little more information.

Mr. HUBBARD. If I understand you, since the original grant two railroads have been extended into this territory.

Mr. ROCKWOOD. Yes; the Canadian Northern has been built and the Minnesota and International line has been extended there.

Mr. HUBBARD. Had the project which you represent, or the people interested in it, anything to do with those railroad extensions? Did they, to any extent, offer an inducement to the railroads to come in?

Mr. ROCKWOOD. So far as the Northern Pacific Railroad was concerned, it was a great inducement.

Mr. HUBBARD. How about the Canadian Northern?

Mr. ROCKWOOD. I do not know. That is a transcontinental line.

Mr. HUBBARD. And the Minnesota and International is part of the Northern Pacific system?

Mr. ROCKWOOD. One of the proprietary lines.

Mr. HUBBARD. I did not understand that.

Mr. STEVENS. As a matter of fact, Mr. Rockwood has placed in the record the names of the men interested in this improvement, who furnished the money to build part of this Northern Pacific extension.

You have had extensions of time to May 4, 1900, to May 4, 1907, and to July 1, 1908, three extensions. Why have those extensions been necessary?

Mr. ROCKWOOD. In the first place, the original permission was asked for as a part of the necessary preparation for getting the entire scheme in working order. It was necessary to deal with both governments, and when we went to ask for a grant from the province of Ontario they asked whether we could put in the dam if we had the contract. That was as early as 1898, and we came and asked Congress for permission to put in the dam so that we would be in a position to negotiate with the province of Ontario.

Mr. HUBBARD. Which government did you apply to first?

Mr. ROCKWOOD. I am not able to tell exactly, but about the same time—I think we applied first to the province of Ontario, but I am not certain. Time was drawing to a close; it was limited in the first act of Congress. We had no contract with the province of Ontario; we had not been able to get one; we were opposed in that by Mackenzie and Mann, who asked for themselves.

Mr. STEVENS. Were Mackenzie and Mann the same men who own and control the Canadian Northern Railroad?

Mr. ROCKWOOD. The same, and in order to be in a position to continue our negotiations we asked for this extension of time, the first extension. Then we continued those negotiations, and, as I say, we got the first contract in January or February, 1905, and immediately began work; and when our first extension had about expired we asked for another one, and it was granted without any question whatever, and that is the one which is now about expiring. And during all of this time, it must be remembered that in order to utilize this power we had to have the railroad, and we did not get a railroad until last December.

Mr. HUBBARD. You say, "in order to utilize the power;" you mean in order to construct the dam?

Mr. ROCKWOOD. Not that; the dam was not worth anything without the railroad. If we built the dam and failed to get the railroad, every dollar in the dam would be lost.

Mr. HUBBARD. So the two enterprises had to proceed along together.

Mr. ROCKWOOD. To be available and worth anything, we had to have both.

Mr. STEVENS. Tell us, and make of record, the condition of that country as to the settlemment on both sides of the river, about the number of people there, their occupation, and the nature of their business during all of the last ten years.

Mr. ROCKWOOD. The land at this point, excepting this one entry, which was made earlier, was substantially all of it Government land until about 1895. Since that time a large amount of Government land has been taken under the various laws, and there is a scattering population through the woods. I am not able to give any numbers, and do not carry any numbers in my mind, excepting that at this point I will say that a village has grown up of about a thousand people, approximately, at International Falls, and they have settled there on the faith of the development of this power; otherwise there would be no occasion for any village there.

Mr. STEVENS. Is that a farming district?

Mr. ROCKWOOD. It will be.

Mr. STEVENS. Is it or has it been up to this time?

Mr. ROCKWOOD. It has not been to any considerable degree a farming district heretofore, but it has great agricultural possibilities. The timber and brush has to be cleared, and a great deal of the swamp land will have to be drained; but it is going to be an agricultural district.

Mr. STEVENS. What timber resources are there in that vicinity?

Mr. ROCKWOOD. There is a great deal of spruce and poplar, material for paper, and quite considerable of pine, cedar, and tamarack. Those are the principal merchantable varieties of timber.

Mr. STEVENS. Are there any minerals in that vicinity?

Mr. ROCKWOOD. Not that we know of. There has been some gold found in that region, but the nearest minerals available are the iron ranges which are 74 miles away.

Mr. STEVENS. Was there some mineral mined north of there at Rat Portage?

Mr. ROCKWOOD. A little gold was mined, but not with very great success. They have been exploring for gold, prospecting about Rainy Lake and north of there, but the amount found has been small.

Mr. STEVENS. What population is there on the Canadian side?

Mr. ROCKWOOD. Not far from the same on the Minnesota side, approximately a thousand. That is a much older settlement, but the population is not very much greater.

Mr. STEVENS. What is the name of the settlement on the Canadian side?

Mr. ROCKWOOD. Fort Frances.

Mr. BEDE. Is that not an old Hudson Bay station?

Mr. ROCKWOOD. Yes; approximately two hundred and fifty years old. The furs that were brought out from that valley two hundred and fifty years ago were the inducement to organize the Hudson Bay

Company, it being one of its first posts, and it has been the post of the Hudson Bay Company down almost to the present time.

Mr. HUBBARD. Are you going to put the Canadian grant in the record?

Mr. ROCKWOOD. Yes; I will get it.

Mr. HUBBARD. What was the time limit in that grant?

Mr. ROCKWOOD. That also has been extended. The expiration for the building of the dam on the Canadian side was, I think, this year, but has been extended.

Mr. HUBBARD. To what time?

Mr. ROCKWOOD. I had nothing to do with getting that extension, but Mr. Backus told me he had time.

Mr. HUBBARD. I will be glad if you will put that in the record. Also in a general way now tell me what the terms and the conditions of that Canadian grant were.

Mr. ROCKWOOD. I will state those as nearly as I can remember them. We paid $5,000 cash. There is an agreement that the town of Fort Frances shall have the right to purchase for its municipal uses power not exceeding, I think, a thousand horsepower at $14 or $15 per horsepower per annum; and there is a condition that any power which we may not use ourselves shall be available to other purchasers, and that if we can not agree with the purchasers on what is a fair price the Ontario government may arbitrate that price, so that it shall be sold at a fair price. Those in substance are the terms of the agreement.

Mr. STEVENS. What, if any, provision in any provincial grant, or any provision in any contract, or understanding with either the Canadian authorities or the municipal authorities on the American side, has been made for the distribution of power on either or both sides? Is there any agreement or understanding anywhere about the distribution of that power to Canada or to the United States?

Mr. ROCKWOOD. There is a provision that one-half of the power shall be available for the Canadian side, something of that kind. There is no provision with reference to the American side.

Mr. STEVENS. In what is that provision contained?

Mr. ROCKWOOD. In this contract that I speak of.

Mr. HUBBARD. In the Canadian grant?

Mr. ROCKWOOD. Yes; in the grant from the Province of Ontario. The Province of Ontario owned the land on the Ontario side and owned the water power, and we purchased it from them.

Mr. HUBBARD. Is that what was represented by the $5,000?

Mr. ROCKWOOD. That is right.

Mr. HUBBARD. You purchased whatever right you may have under that grant, but you also purchased some land from them?

Mr. ROCKWOOD. Four or five acres of land immediately at the end of the dam, and necessary for manufacturing purposes.

Mr. BEDE. Has Canada used the canal on that side?

Mr. ROCKWOOD. No. The Canadian government commenced the construction of a lock in the seventies, but it was abandoned when the construction of the Pacific road was determined on, and they have not done any construction work since.

Mr. HUBBARD. Do you mean the Canadian Pacific Railroad; not the Canadian Northern?

Mr. ROCKWOOD. The Canadian Pacific, nearly thirty years ago. We went ahead and completed that canal which the Canadian government had commenced for a waste canal.

Mr. BEDE. Was that of some advantage to you people?

Mr. ROCKWOOD. Possibly some, but not very great.

Mr. STEVENS. Will you place in the record here a statement as to the law of either the Dominion of Canada or the Province of Ontario, or both, as to the ownership or proprietary interest in the land under the river bed to the thread of the stream, and the water above that; what governmental interest is there in that land and in that water in Canada?

Mr. ROCKWOOD. Before the execution of this contract the Province of Ontario owned the land and owned the riparian rights, and in the soil, under the water to the center of the stream to the international boundary, and the right to use the water power. The government of the Dominion of Canada had the power to preserve navigation similar to the power which our Federal Government claimed, but the Dominion of Canada has no proprietary interest in the land or the water, and we purchased from the Province of Ontario just as we might have purchased from any other owner.

Mr. HUBBARD. Are there any treaty provisions that affect the control of this stream, particularly of its navigation?

Mr. ROCKWOOD. The original treaty of peace with Great Britain in 1783 declares that this waterway shall be the international boundary. The Webster-Ashburton treaty of 1842 declares again that the center of the stream is the international boundary, and declares that this waterway shall be free to the citizens and subjects of both countries, so that by treaty between the two countries the right of navigation is preserved to both, and for that reason the construction of this dam was approved by the Parliament of the Dominion of Canada as well as by the legislature of the Province of Ontario.

Mr. HUBBARD. Will you put the evidence of that approval in?

Mr. ROCKWOOD. Yes; I can furnish a copy of that, but it will take a little time to get it.

Mr. ESCH. Was there anything with reference to this in the Rush-Vagot treaty?

Mr. ROCKWOOD. If there was I have overlooked it; I am not aware that there was.

Mr. ESCH. That was subsequent to the Webster-Ashburton treaty?

Mr. STEVENS. I think that was in 1819. Have you covered all the different facts that you know about, and that have reference to this proposition?

Mr. ROCKWOOD. I think I have.

Mr. STEVENS. Then we will start in upon the different points in the veto message, and we would like to have you discuss them in the order in which the President has discussed them: "First. There should be a limited or carefully guarded grant in the nature of an option or opportunity afforded with reasonable time for development of plants and for execution of the project."

Mr. ROCKWOOD. That goes to the question of law, the title to the property, and to the nature of the powers of the Federal Government; and if it will serve the purpose I should be glad to discuss those questions of law, and then, perhaps, draw conclusions from them

finally with reference to specific questions that the President has suggested.

Mr. STEVENS. That is to say, you think your discussion would answer most of these different propositions?

Mr. ROCKWOOD. I think all.

Mr. STEVENS. Then it will save time for you to proceed in your own way, subject to such questions as the committee may wish to ask.

Mr. ROCKWOOD. I have a statement in which I have incorporated several propositions of law, and it embodies some of the facts that I have stated here, but it does not embody them all, so I would like to file that statement.

First, this land was patented to Alexander Baker in 1884—the shore land. He resided on it for about fifteen years then, claiming homestead rights. The survey was not made until 1881. Immediately upon the filing of the survey he made his application under the homestead laws, and afterwards perfected his proof, and the patent was issued to him in 1884. That is recorded in volume 11, page 381, in the office of the recorder of the General Land Office. It is a patent of the shore land, lot 1, section 27, town 71, range 24, and other parcels. The water power lies against this particular parcel, and the patent conveyed the land without any reservation or restriction whatever, it being the ordinary form of Government patent.

Now, I think the following propositions are established, and that there is no judicial difference of opinion respecting them: First, United States patents are construed according to the law of the State in which the lands lie. Second, in the State of Minnesota a patent of shore land without restriction or reservation carries to the grantee everything which the United States has power to grant, and any attempt to make a subsequent grant is void.

Mr. HUBBARD. Was this grant by the State of Minnesota?

Mr. ROCKWOOD. By the United States.

Mr. HUBBARD. I did not catch the force of what you just stated. You were speaking of the effect, I thought, of a grant in the State of Minnesota.

Mr. ROCKWOOD. I am speaking of a grant by the United States of land lying in Minnesota.

Mr. ROCKWOOD. Third. The riparian owner has the exclusive right to occupy and use, and he may sever and convey the right to use the shallow water adjacent to his lands in any way not detrimental to the public right of navigation.

Fourth. Among the rights of a riparian owner is the right to use the flowing water for power purposes by the usual methods, doing no injury to the public right of navigation.

Fifth. In the State of Minnesota the title to navigable waters and the soil under them is in the State in its sovereign capacity in trust for public uses.

Sixth. The State can not use the water nor the soil under them for any revenue purposes.

Seventh. The power of Congress respecting navigable waters is derived from the commerce clause and it is limited to that which is necessary to preserve or promote the public right of navigation.

Mr. ESCH. You do not think those propositions have been altered by the fact of this being an international boundary?

Mr. ROCKWOOD. I will call your attention first to the decision of the circuit court of appeals of the sixth circuit in the case of the United States against the Chandler-Dunbar Water Power Company.

Mr. HUBBARD. Is that cited in your brief?

Mr. ROCKWOOD. It is not, but I will add it. It was not called to my attention until yesterday. This decision was affirmed Monday morning by the Supreme Court of the United States.

Mr. ESCH. Is this the St. Marys River case?

Mr. ROCKWOOD. Yes; and it affirms the court of appeals. This case was about as follows: The Falls of St. Mary at the outlet of Lake Superior are not abrupt, but extend over a considerable distance. There is a fall of 18 feet in perhaps a quarter of a mile. Two concerns owned different portions of the land on the Michigan side against the falls, one the Michigan and Lake Superior Power Company and the other, this defendant, the Chandler-Dunbar Water Power Company. The Michigan Lake Superior Power Company under an act of Congress was proceeding to divert waters from the original channel of the river and carry them across a neck of land, in a canal, and utilize them by means of a power house at the foot of the canal. The Chandler-Dunbar Company, the defendant, owned a portion of the land against the fall of the natural stream, the natural channel, and there was about 9 feet of fall in front of its land. At some distance from the shore there were two very low rocky islands of small extent.

The Chandler-Dunbar Company was complaining of the diversion of water by the Michigan Power Company, and the Michigan Power Company undertook to get title to these two islands by filing script or making some application through the Interior Department, claiming that the Chandler-Dunbar Company did not have any right in the river itself, nor to these two islands which lay out in the river. The result of that application before the Interior Department was a recommendation by some officer, I believe the Secretary of the Interior, to the Attorney-General to commence an action for the purpose of determining what were the rights of the United States in these two islands. The Chandler-Dunbar Company claimed it owned a patent of the shore land, just as we claim here. They claimed, just as we do, that the question of title to the bed of the river in front of them was a question of State law, to be determined by the legislature, or by the decisions of the courts of the State of Michigan, and was not a question of Federal law, that the Federal Government by its patent of the shore land had parted with all it had, and that after that patent the sole question as to the title to the bed and the right to use the water was between them as the owners of the shore and the State of Michigan, just as we claim here.

The court summarizes its conclusion in this way, and the relevant propositions established by the decision of the Supreme Court of the United States, as we understand them, are as follows:

First. The original State which united under the Constitution owned the land submerged by the navigable waters within their respective boundaries in right of their sovereignty.

Second. This ownership was not surrendered by their union, and remained unaffected thereby except to that extent that they might be affected by the exercise of the power delegated to the United States to regulate commerce between the States and foreign countries.

Third. From the acquisition of territory by the United States, such new territory was held, the terra firma as well as the submerged lands, in trust for the several new

States which would thereafter be formed from such territory, subject, however, to the right retained by the United States on parting with it to sell the land for revenue, and this doubtless included lands in islands as well as elsewhere, which the United States should regard as valuable and claim for itself.

Fourth. This trust was executed by the United States, and the ownership of the submerged lands relinquished when any State thus formed could be admitted into the Union, for upon such admission the new State was entitled to the same right of sovereignty and be upon an equal footing "in all respects" with the original State. And this was one of the express conditions of the deed of session executed March 1, 1784, by the State of Virginia to the United States Government, of the Northwest Territory, out of which the State of Michigan was formed.

My understanding is that this territory where we are is part of that same ground. The State of Minnesota was not carved wholly out of the Northwest Territory, but that portion east of the Mississippi River was.

Fifth. In the case of the State of Michigan, the condition was performed by the act of Congress of June 16, 1836, by which it was admitted with its northern and eastern boundaries on the international boundary, the new State to be "on an equal footing with the original States in all respects whatever." And thereupon the title to the land submerged by the navigable waters of the State was transferred to the State. But the title to the mainland and of such islands as it should claim was as in other cases expressly reserved to the United States by the act of admission, to be sold for the benefit of all the States.

Sixth. The title to unsurveyed and unclaimed islands in submerging waters is of the same character with that of the bed of the stream or other navigable waters.

Seventh. The ownership by the State of lands submerged by navigable waters is in all the States, and equally in them all, subject to such control by the United States as is necessary to the exercise of the power to regulate commerce. To this extent only is the complete title impaired.

Eighth. The United States has therefore in its several departments—legislative, executive, and judicial—recognized the right of the State in which such submerged lands and unclaimed islands are situated to make such disposition of them as it pleased.

Ninth. The State of Michigan, as have other States, has relinquished them to the riparian owner.

And they held that after making this title to the shore land the United States has no such title legally or equitably as would enable the Government to maintain a bill to remove a cloud from the title originating in this patent and claimed under it, and the suit of the United States was dismissed.

Mr. HUBBARD. You claim the United States has nothing to do with the use of water for power if that use does not affect the navigation of streams?

Mr. ROCKWOOD. Absolutely that; that the United States has no more right after having parted with the land to say that it shall not be used for the development of water power than it has to say that it shall not be used to raise potatoes.

Mr. HUBBARD. Would you say that the United States itself could not use the water for the purpose of producing power?

Mr. ROCKWOOD. Excepting this, that if the United States for the purpose of improving navigation, not for any other purpose, but in good faith for the purpose of improving navigation, should construct a dam and create a water power, the Government may utilize that power and sell it.

Mr. HUBBARD. Incidental to the construction of the work for the benefit to navigation?

Mr. ROCKWOOD. Purely as an incident, and it would have no other justification whatever.

Mr. HUBBARD. Where does that power rest, or does it exist at all, up to the time when the Government does construct such a work?

You say that when the work is constructed, which is in good faith for the benefit of navigation, the United States may dispose of the power which was incidentally created by that work. There was a possibility at all times before that, that that may happen. May the State or its grantees make such disposition based upon the ownership of the submerged land as would prevent the exercise by the Government in the future of that power?

Mr. ROCKWOOD. It could not. The powers which the United States Government has it has by virtue of the Constitution, and from what are defined particularly as police powers, sovereign powers, the power does not exist to part with them. Neither the State nor Congress, nor any other power within the nation, except——

Mr. ESCH. By amending the Constitution.

Mr. ROCKWOOD. Except through amendment of the Constitution. No other power exists to subtract from or diminish in any way the police, the sovereign powers of the nation, including the power to regulate and protect interstate and foreign commerce.

Now, the Congress might make all the grants that it could print on paper, and if the next day it found it necessary to repeal those grants and to exercise its power to regulate and promote interstate and foreign commerce, those grants would not stand in the way at all.

Mr. ESCH. That is implied by the reservation in every one of these dam bills.

Mr. ROCKWOOD. It is implied, but it would be there if not implied.

Mr. ESCH. But it is an express reservation of the power?

Mr. ROCKWOOD. Yes; but it is a power to be exercised for that purpose and no other. Congress could not withdraw the grant for any purpose, withdraw its permission to construct a dam for power purposes, except for the purpose of protecting navigation. So that it does not make any difference what Congress may or may not do, it can not tie its own hands or the hands of any future Congress so that the Government will not have all the power it ever had to protect navigation; there is no question about that. That was settled in the Chicago, Ill., lake-front case, the case of the Illinois Central Railroad *v.* The State of Illinois, and found in 146 U. S. There the State legislature, away back in the early days of railroads, had granted to this railroad company the right to use a very large tract of shallow water on the Michigan Lake front. After that grant had stood on the statute books for many years, and had been partially utilized by constructing railroads, railroad yards, and terminal grounds, the State legislature repealed the act and undertook to resume possession and assert the rights of the public in that submerged land of the lake. The suit was one to restrain the State from interfering with the railroad company in the enjoyment of its original grant, and it was decided first in the State supreme court, brought here, and this was the result of it, that the State kept the title to the soil, or bed of the lake, and the title to the water, but a title in trust for the public uses, and that the State could not abrogate that trust, could not convey the subject-matter of it, and that the most the original grant amounted to was a license to occupy during the will of the State, and that the license was terminated by repealing the act, and that the State might resume its original right to the possessions.

Now, such powers as the Government has it can not part with, and there is no danger, absolutely no danger, in any bill, no matter what

the form of it, that Congress might pass, because the powers of the Government, the powers of Congress, are inalienable.

Mr. HUBBARD. Might there not be this danger, that if an absolute grant, with no notice on its face of power to resume the thing granted, were made, and Congress thereafter endeavored to cancel that grant that the grantee would have a pretty strong equitable claim to relief, very much stronger than if the grant on its face had provided for it? As a practical question, it would amount to a good deal, would it not?

Mr. ROCKWOOD. It might under some circumstances, but the law on that subject is so well settled, and so well known——

Mr. HUBBARD. When the question comes as to the enforcing of the law, you may have the right to enforce it, and yet the person against whom you seek to enforce it may make up such a case growing out of the original grant as might make Congress or the authorities of the Government hesitate.

Mr. ROCKWOOD. Of course that is a practical question; there might be something in that. But what are we proposing to do here that anyone can conceive ought to be undone. In the first place, every bill that has been proposed has been on its face subject to the right of modification or repeal, so that it carries notice that Congress is going to exercise the power if it becomes necessary; and, in the second place, we are doing just exactly what the Government itself would do if the Government were going to improve that waterway. We are creating a dam with storage, equalizing the flow.

Mr. ESCH. But the Government would have to build the lock.

Mr. ROCKWOOD. The Government would have to build the lock anyway. Third, we are proposing to deed to the United States the very land which has been selected and designated by those engineers as desirable for the construction of a lock, if the time ever comes to construct one.

Mr. ESCH. Will you concede that a reasonable exercise of authority on the part of the Government in granting to you the right to build the dam, to ask on your part the construction of the lock?

Mr. HUBBARD. Whenever required, the grant to fail if they do not comply?

Mr. ROCKWOOD. Now, no one has suggested to me any reason why such a demand should be made. The Government has parted with this land just as fully, just as completely, as it has parted with any piece of land that it ever owned. Under the law of the State of Minnesota—I have stated the case in my brief—that has been passed upon time and time again. We own riparian rights, and we have the right independently of any legislation to construct the dam and utilize the water power. That is a part of our property.

Mr. HUBBARD. You stand on the proposition that the United States has no right to interfere with that as long as you do not interfere with navigation; that the United States can not prevent your doing it?

Mr. ROCKWOOD. I think that is the law. I think that Congress may properly pass this kind of an act; it passed it heretofore: That before we actually proceed we shall submit our plans, and let the Chief of Engineers say whether what we propose to do is an obstruction to navigation or not.

Mr. HUBBARD. You think then that the only value of an act of

Congress is a certificate that your work will not interfere with navigation?

Mr. ROCKWOOD. I think that is the sole effect of it. Every city—I suppose the city of Washington, through Congress, which is the legislative body—has fire ordinances, and it prescribes that within certain limits no building shall be erected excepting a fireproof building. Now, I own a piece of ground, say, on Pennsylvania avenue, and I have owned it perhaps for fifty years. I have not utilized it, but I have owned it and paid the taxes on it and just let it lie there, making no use of it whatever. But finally I decide that I want to put some sort of a building on it, and I find that Congress has required that before I shall go ahead, I shall submit my plans to the building inspector, or some other officer, and that I can not proceed at all unless the plans comply with the building ordinance, in putting up a building that will not be a peril to other buildings. Now, when I have submitted those plans, when I have complied with the law in preparing the plan and am ready to comply with the law in erecting the building, Congress, or the legislative council (whatever may be the municipal authority), is not selling or granting to me any privilege in issuing that permit. What it is doing is to restrict me in the use of my own property. It is a local restriction to say that I shall use the property in a way to do no other any injury, but it is not any answer to my demand for a permit to say that I have had the opportunity to put that building up for fifty years and have not done it.

Mr. ESCH. We have granted the right to build dams, and as a condition required the construction of a lock which would take care of navigation. I think we did that in giving the right to build a dam at Davenport, Iowa, across the Mississippi River, and I think that was the case in the Muscle Shoals bill respecting the Tennessee River also. But the dam, of course, avoided the rapids and improved navigation.

Mr. HUBBARD. The Tennessee River at certain seasons, I imagine, is not navigable over those shoals, so to that extent it is a case which is parallel to this.

Mr. ROCKWOOD. I understand in those cases a dam would prevent such navigation as was before possible at certain times and under certain difficulties navigation was before possible, but the dam would prevent it. Now, in that case undoubtedly it would be a proper exercise of power to say, "If we permit you to cut off such use of the river as is possible, then you must furnish an equivalent by means of a lock." Here loose logs can run down, and we have got to put in a log sluice; that is required.

Mr. HUBBARD. Required by what?

Mr. ROCKWOOD. I do not know whether it is expressed in the act, but required by permits of the Secretary of War.

Now, I think nothing could be better established than that this is a mere supervision of the exercise by us of the right to improve and use our own property, and to require us to construct a lock that might cost one, two, or three hundred thousand dollars would be simply exacting from us that money without right as a condition of using and improving our own property.

Mr. ESCH. When you submitted your plans to the War Department, they made no demand that you should construct such a lock?

Mr. ROCKWOOD. Nobody suggested it, so far as I know.

Mr. ESCH. But you ceded to the Federal Government enough land so that such lock could be constructed when demanded by the War Department?

Mr. ROCKWOOD. That deed has not been made. They have asked for it, and we have never refused it. We are ready to make that deed. We do not think that we are obliged to do even that, but we did not want to take a position that was unreasonable, and we acceded to that request. But we do not think it would be reasonable to require us to expend one, two, or three hundred thousand dollars; I don't know how much it would cost, but it would cost a large sum——

Mr. ESCH. Your idea being that the construction of this dam will not interfere with navigation as it now exists and has existed, but in fact would improve it?

Mr. ROCKWOOD. That is absolutely true.

Mr. ESCH. Therefore you ought not to be burdened with the construction of a lock which would further navigation?

Mr. ROCKWOOD. No, an artificial improvement, which has not been made necessary by anything that we have done or propose to do. Every single interest on that river, on both sides, every steamboat owner, wants this work completed, and is waiting anxiously to have it, because they will be better off when it is done.

Mr. BEDE. It will raise the water above the dam about 6 feet.

Mr. HUBBARD. You stated that it would not affect the rights of the portage.

Mr. ROCKWOOD. Not at all, not affect it by an inch.

Mr. ESCH. I thought you said that the flow of water below the dam would be better than it is now, that it would allow the boats to come up to the dam; that the dam would be the limit of navigation from above, and that there would be a very small interval of space. That is why I thought it might shorten the portage.

Mr. ROCKWOOD. No, practically it would not, because a dam there can not be constructed in a straight line across the stream. Those rocks are so set that the dam must be V-shaped.

Mr. ESCH. It does not make much difference if it is only four or five hundred feet anyhow.

Mr. ROCKWOOD. It would not make much difference.

Now, I want to read two or three paragraphs from the decisions of the supreme court of Minnesota to show that I have stated correctly the law of the State.

Mr. Esch, you undoubtedly know Judge Mitchell, of Winona, perhaps the ablest judge that we have had on the supreme bench of Minnesota, and this decision in the case of Lambrey *v.* The State of Minnesota, in 52 Minn., 181, has become a classic. It is quoted over and over again by text writers and in the decisions in other jurisdictions. He says:

> There are certain matters which are so well settled that they may be summarily disposed of at the outset. Without troubling ourselves to consider what were the rights of the United States in these waters before they conveyed the land bordering on them, it is well settled that, having disposed of land bordering on a meandered lake by patent, without reservation or restriction, they have nothing left to convey, and consequently the Land Department was thereafter without jurisdiction, and the Gilmore patent, issued in 1873, was inoperative and void; also that a meander line is not a boundary, but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not; also, that grants by

the United States of its public lands on streams or other waters, made without reservation or restriction, are to be construed according to the law of the State in which the lands lie; and, consequently, whether the land forming the beds of these lakes belong to the State, or to the owners of riparian lands, is a question to be determined wholly by the laws of Minnesota. In support of these propositions we need only to cite Hardin *v.* Jordan (140 U. S., 371) and Mitchell *v.* Smale (140 U. S., 406).

The question whether the right to utilize a right for water-power purposes was a riparian right was raised early in Minnesota, and in the case of Morrill *v.* St. Anthony Falls Water Power Company (26 Minn., 222) the plaintiff and the defendant each had riparian rights, the power company was diverting water from the frontage, and the plaintiff Morrill brought suit to restrain the diversion. He was not using his water privilege at all; but he owned the land, and the court first quoted quite a large number of decisions, the trend of which was to sustain the position of the plaintiff, and he says:

As it seems to us, none of these opinions state the case too strongly. If the right exists jure naturae, because the land has by nature the advantage of being washed by the stream, it is impossible to see how any such distinction as defendant claims can be made as to the peculiar uses which the riparian owner may make of the water. The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right. We think the right in the riparian owner to put the water to any useful purpose may be sustained by considerations of public policy. It is certainly for the interests of the public that where the waters of a navigable stream may, without interfering with the public right, be put to some useful purpose, the right to so use them should exist.

That question has been before the Supreme Court in various forms a number of times, and the last time was in the Ninety-first Minnesota, in the case of the Crookston Water Works Power and Light Company *v.* Sprague, page 461:

Subject to the control of Congress in proper cases, and independently of statute, the right of riparian owners to construct, maintain, and operate dams upon rivers and streams in this State is firmly established by the decisions of this court.

This was a navigable stream, being the Red Lake River at Crookston. Here is a quotation from the case of Gilman *v.* Philadelphia (2 Wallace, 713, Supreme Court of the United States). The question was whether a bridge might be built across the Schuylkill River, I believe, by the city of Philadelphia, and a riparian owner further up the stream was objecting. In discussing the powers of Congress in respect to it the court says this:

Commerce includes navigation. The power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress. Gibbons *v.* Ogden (9 Wheat., 1); Corfield *v.* Coryell (4 Wash., C. C. 378). This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the State or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the State before the adoption of the National Constitution and which have always existed in the Parliament in England.

Mr. HUBBARD. You claim that this dam does not interfere in fact with the navigation of the stream?

Mr. ROCKWOOD. It does not interfere with the navigation of the stream in any single particular. In every important respect it vastly improves navigation.

Mr. HUBBARD. Could you build the dam without the consent of Congress?

Mr. ROCKWOOD. I think we could, but we did not want to be placed in any such position; but I think we could.

Mr. HUBBARD. I understand that.

Mr. ESCH. You could not without the consent of the Ontario government, could you?

Mr. ROCKWOOD. No; we could not have done that because we didn't own the land. The Ontario government owned the land; but owning the land I think we could. I think the law there is substantially the same as here.

Mr. HUBBARD. That is, your ownership of the riparian rights gives you the right without the consent of anybody else to build a dam which will not in fact interfere with navigation?

Mr. ROCKWOOD. I think that is the law absolutely, with this qualification; so long as Congress, with proper authority, as a means of inspection and supervision, requires us to submit our plans in advance so that it may be determined whether we are going to do injury or not, I think Congress is properly exercising its power. But when it sets back and says: "We do not care what your plans are, you can not build the dam," I think that is a wholly different question.

Mr. HUBBARD. You concede that the Government might build this dam, and in so doing might incidentally create water power. In that case I suppose you would further concede that the Government might sell the water power?

Mr. ROCKWOOD. I want to add to that in this way: The Government will have the right to construct this dam and raise the water up to the ordinary high-water mark, but in doing that it would do navigation substantially no good at all. It can not go further than that without condemnation of our property and paying its value.

Mr. HUBBARD. That is, it can not construct a work for the purpose of creating water power?

Mr. ROCKWOOD. It can not construct a work for any purpose beyond that point until it acquires the additional land by condemnation, or purchase, or some other means.

Now, we are carrying this dam above ordinary high-water mark, and we are obliged to do it in order either to fully utilize the power, or to effect any substantial improvement to navigation. In order to build such a dam as we are going to build, Congress would have to acquire our property, and would have to pay the value of it, and to pay for the riparian rights.

Mr. HUBBARD. Suppose it acquires the right in the bed and on the banks of the stream that would be necessary for the construction of a dam, you concede that the Government may thereby incidentally create the water power, but it could not construct a dam for the purpose of creating the water power. May it sell the water power?

Mr. ROCKWOOD. I think it can.

Mr. HUBBARD. If it chose, instead of building a dam itself, to permit the building of it, under its power to control navigation, by a private corporation, and might it not make a provision in that grant that it may have the same right to dispose of water power created by that or to impose the same terms on the sale of it as it would have to sell it if created by itself?

Mr. ROCKWOOD. Yes; it could grant that power to a public corporation organized to improve navigation, and that company could condemn and pay for our property.

Mr. HUBBARD. In other words, is there any difference in what may be done by the water power created, whether incidentally by the Government building the dam or created by the building of the dam with the consent of the Government?

Mr. ROCKWOOD. There is this practical difference: The power of condemnation can only be exercised for the purpose of improvement of navigation. For power purposes the power is of no use unless it can be used for manufacturing purposes, and that requires additional land, and for that you can not condemn; so that I do not think Congress could convey or could grant power to any corporation that that corporation could afford to exercise.

Mr. HUBBARD. It would fully provide, would it not, that the Government could not sell the power which was incidentally created by its construction of the dam?

Mr. ROCKWOOD. It can sell it and get what it can for it, but its market would be restricted.

Mr. HUBBARD. Further than that it could not dispose of the power commercially except by acquiring additional land, could it?

Mr. ROCKWOOD. No; so as to be practically available, excepting possibly it could be accomplished, perhaps, in this way: A navigation company could be organized and construct the dam to improve navigation and to use the power incidentally created. Then, perhaps, an electric-light company of a public character could condemn a right of way to carry electricity away and sell it. But for ordinary manufacturing purposes for which that power is available the owners of that land are probably the only customers.

Mr. HUBBARD. I am taking the case of a dam built by the Government which you say may incidentally create water power, and I understood you to say the Government might then sell that water power incidentally created by it, but could not develop the power without ownership of the ground on the shore.

Mr. ROCKWOOD. No; you could not.

Mr. HUBBARD. Could not condemn for that purpose. It would follow, therefore, that the Government could not sell water power under those circumstances.

Mr. ROCKWOOD. Practically, that is true.

Mr. ESCH. I think that eminent domain would not go to the transmission of that power for commercial use.

Mr. ROCKWOOD. It might go to the transmission of electric power.

Mr. BEDE. Do they not do it now in Minneapolis?

Mr. ROCKWOOD. On the question of transmission of electric power for public use the decisions are pretty evenly divided. Our own supreme court has held that they may be publicly used, but there is no market either for that sort of power there, and there will not be until there is a city, and there will not be a city until there is manufacturing there.

I would like to call your attention in this connection to the speech of Senator Teller in the Senate upon this subject, which is in the Congressional Record of April 2, pages 4411 and following, in which he discusses the question at great length and cites a great many cases, and the cases are uniform. The cases are as thick as flies in the

summer on this question, and there is absolutely no diversity. They are just as uniform as they are upon the question of whether a man is liable to pay upon a promissory note, or whether land can be conveyed by deed. There is no diversity that I have discovered.

Mr. ESCH. What do you think of the suggestion of the President with reference to the time limit of grant?

Mr. ROCKWOOD. In answer to that question I have simply this to say, that a time limit is right and proper so far as it is essential to the exercise of this supervision, but when that time limit has expired the right to build is no more forfeited than the right to improve property in the case I have mentioned would be forfeited if the owner did not build within a time specified under municipal building ordinances. He still owns the property, and if he can not build within the time first limited, he has a right to go back and submit plans again, and have them passed upon.

Mr. HUBBARD. That brings you back again to the old proposition that you have a right to build a dam without anybody's consent, provided it does not interfere with navigation, and that the office of Congress is simply to inquire in a formal way as to what you are going to do with respect to navigation.

Mr. ROCKWOOD. I think that is absolutely right.

Mr. HUBBARD. And your other proposition depends upon that?

Mr. ROCKWOOD. Yes; if Congress had anything to grant, if it had any property to convey, the question would be entirely different, but it has not; and that is, I think, settled so far as anything can possibly be settled.

Mr. HUBBARD. Do you want to make any statement of your view based upon a possibility that Congress might be considered as having something to grant, whether in that case there ought to be a limit, and if so, what the limit ought to be; whether the right should expire without any compensation to the licensee at the end of that time, or, if compensation were granted, whether for the valuation of the right. Have you considered those questions at all?

Mr. ROCKWOOD. Our position is this: Here is a great Government on one side and a citizen on the other, trying to carry on a useful industry. I think, if possible, we ought to arrive at a common ground as to what the respective rights and duties of the two parties are, and before making any suggestions as to what would be a reasonable compensation for what is granted some one should point out something that is granted.

Mr. HUBBARD. That is the other proposition.

Mr. ROCKWOOD. Then the compensation should be fixed with reference to the right that is given. Until some one does point out something, until some one suggests—I have not heard the suggestion yet—that the United States has anything to grant.

Mr. HUBBARD. Do you not find a pretty strong hint of that in the veto message, where the people's right in flowing waters is disposed of?

Mr. ROCKWOOD. I think the President must have supposed that this was Government land.

Mr. STEVENS. There is one phrase in the message: "In place of the present haphazard policy of permanently alienating valuable public property."

Mr. ROCKWOOD. I think he supposed that this act related to public property and not to granted property.

Mr. HUBBARD. You do not think, then, that he supposed that the banks, being in private ownership, the public might have ownership in the water other than for navigation purposes?

Mr. ROCKWOOD. I think he must have been misinformed of the fact. I still have unbounded respect and admiration for the President, but I was taught long ago to read the decisions of the Supreme Court for the law.

Mr. STEVENS. Did you find in that decision of the Supreme Court rendered last Monday anything that bore upon this question?

Mr. ROCKWOOD. I could not get the decision. The clerk said that it would not be ready until the last of the week. I read into the record the decision of the circuit court of appeals which the Supreme Court affirmed.

Mr. STEVENS. And that did bear upon this proposition?

Mr. ROCKWOOD. Directly and exactly on this proposition.

Mr. STEVENS. That is important.

Mr. ROCKWOOD. And sustains my position.

Mr. BEDE. If the Government should impose any serious burden, could you make the enterprise a success?

Mr. ROCKWOOD. Probably not.

Mr. HUBBARD. That would be dependent upon the enterprise. Of course the amount and the propriety of imposing it would depend upon the expenditure to be made by those who took the grant.

Mr. STEVENS. Do you conceive that if we did nothing, and your time limit expired on the 1st day of July, that there is any sort of forfeiture that could be enforced against you?

Mr. ROCKWOOD. The United States hasn't any right of forfeiture. I do not think, Mr. Chairman, that the United States has the power to cause us to forfeit anything, because I do not think that the United States has granted anything.

Mr. STEVENS. Of course there is no property right that the United States has granted that it could take back.

Mr. ROCKWOOD. No.

Mr. STEVENS. The only thing it could do would be to extend or not extend a privilege that has already been granted you.

Mr. ROCKWOOD. I stated—possibly while you were out—what I think the law is on that subject.

Mr. STEVENS. You need not restate it now.

Mr. ROCKWOOD. I would be glad to restate it. I think that it is proper on the part of Congress to ask us to submit our plans for inspection and improvement, but if Congress refuses to inspect any plan, and says "It makes no difference what the plans are, you can not build anyway," then I think we can go ahead and build. But I do not think that men with money would dare, perhaps, to rely upon my judgment.

Mr. STEVENS. Is it your opinion that the second ground stated by the President, "Such a grant of concession should be accompanied in the act making the grant by a provision expressly making it the duty of a designated official to annul the grant if the work is not begun or plans are not carried out in accordance with the authority granted"—supposing you deviated from the act of Congress or the license from the War Department, what would be the authority of the Government in such a case?

Mr. ROCKWOOD. The authority of the Government would be to do whatever might be necessary to do.

Mr. STEVENS. We could exact penal provisions, could we not?

Mr. ROCKWOOD. So far as would be necessary to preserve the right of navigation.

Mr. STEVENS. There are penal provisions, as a matter of fact, on the statute books now, are there not?

Mr. ROCKWOOD. Yes; those are enforced. I have no doubt of the validity of those.

Mr. STEVENS. Will you please put in here the laws relating to the penal provisions?

Mr. ROCKWOOD. Yes.

Mr. STEVENS. Now, further, could not the United States tell you to take out that which is already in the navigable waters, or if you refused and did not take it out, remove it itself and compel you to pay the bill, if it could collect anything?

Mr. ROCKWOOD. There is no doubt, if it were done in good faith for the promoting of the rights of navigation.

Mr. STEVENS. Assuming everything was in good faith.

Mr. ROCKWOOD. And for the single purpose of promoting navigation.

Mr. STEVENS. And that is done quite often in this country?

Mr. ROCKWOOD. Yes; frequently.

Mr. STEVENS. So that there is a right of forfeiture in a way under another form?

Mr. ROCKWOOD. There is a power in Congress which Congress can not divest itself of, promoting the right of navigation.

Mr. HUBBARD. But in the case of the power vested in an officer to proceed to require you to remove it.

Mr. ROCKWOOD. I haven't investigated the statutes with reference to that, but if no officer is empowered some officer may be empowered to do it.

Mr. STEVENS. I think Congress has provided for that; I think the Secretary of War has that authority now and that it is ample.

Mr. HUBBARD. Please cover that feature in your examination of the statutes.

Mr. STEVENS. Now, as to the third proposition:

It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of power.

Is or is not that covered to some extent in the act of May 21, 1906, relating to the construction of dams in navigable waters? In other words, does that act provide that the Secretary of War and the Chief of Engineers shall, in approving the plans, seek to abolish the very thing stated in that third objection?

Mr. ROCKWOOD. I think that is true.

Mr. ESCH. In your case you maintain that you are completely utilizing the power at this place?

Mr. ROCKWOOD. We are. These plans and these photographs show that. These plans are designed to develop every pound of power that is possible.

Mr. HUBBARD. Will you put in the record, either at large or by

reference, the several reports of the engineers dealing with this project?

Mr. ROCKWOOD. I will do that. I do not know how full those reports are. My communications with the engineer have been chiefly verbal, in St. Paul.

Mr. STEVENS. The fourth proposition is:

There should be a license fee or charge which, though small or normal at the outset, can in the future be adjusted so as to secure a control in the interests of the public.

I suppose you discussed that in my absence?

Mr. ROCKWOOD. I discussed that, and I said that is based upon the assumption that this is Government property which is being granted, and it overlooks the fact that the Government granted all that it had to grant twenty-five years ago when it patented the land.

Mr. STEVENS. Fifth:

Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at that time.

Mr. ROCKWOOD. That is based upon the same misapprehension, I think.

Mr. STEVENS. There is nothing further that you desire to submit in addition to what has already been submitted?

Mr. ROCKWOOD. I know of nothing further.

Adjourned at 1.20 p. m.

Following additional statements were filed by Mr. Rockwood:

THE NEW WILLARD,
PENNSYLVANIA AVENUE, FOURTEENTH AND F STREETS,
Washington, D. C., May 2, 1908.

Hon. F. C. STEVENS,
Chairman Subcommittee, House of Representatives,
Washington, D. C.

DEAR SIR: I hand you herewith copy of "The act of Parliament of the Dominion government of Canada," which gives us the right to construct a power dam on Rainy River. This Canadian company, namely, the Ontario and Minnesota Power Company, is a Canadian corporation and corresponds to the Rainy River Improvement Company on the Minnesota side of the international boundary. Both of these corporations are owned by the Backus-Brooks Company—myself and a few of our close associates. I am president of both of these companies; likewise the financing for the purchase of property and for development work done up to date has all been done by ourselves. We have not issued or sold any securities to the public. Mr. Rockwood has stated to your committee substantially all the facts concerning this development up to date.

However, to what he has said I might add that the Backus-Brooks Company own 30 per cent of the Minnesota and International Railway Company. This road was extended from Bemidje to International Falls, a distance of some 110 miles, at an expense all told of something like $2,500,000, practically for the sole purpose of the inducement offered on account of this water-power development. This project has received a large portion of my time for the past fourteen years. I do not hesitate to say that to the efforts of myself and associates in developing this project is almost entirely responsible for the great

development of that portion of northern Minnesota. At International Falls there are already approximately 1,000 people. At Fort Francis, across the river, there are about 1,200 people. The homesteaders within convenient access of these towns number probably three times as many as there are in these towns. Practically all of these people have gone there having this water-power development in mind as the greatest inducement. The constructive development up to date, including the wasteway canal and the construction material on hand and manufactured, represents a cost of approximately three-quarters of a million dollars, to say nothing about the purchase of the real property. Add to this the cost of our railroad investments and many hundreds of thousands of dollars invested in timber to be used by the industries to be created by this water power and you will at once realize how serious a blow adverse action by Congress will be to us.

We are not asking Congress for anything new; simply an extension of time to complete what it has heretofore granted, and which we have been carrying out in the best of faith and as rapidly as could have been expected under existing circumstances. Should your committee desire further or more accurate or detailed facts or figures, I will be pleased to furnish anything you may desire.

Very truly, yours,

E. W. BACKUS,
President Rainy River Improvement Company.

An act respecting the Ontario and Minnesota Power Company (Limited).

[Assented to July 20, 1905.]

Whereas the Ontario and Minnesota Power Company (Limited) has by its petition represented that it was incorporated by letters patent under the great seal of the Province of Ontario dated the thirteenth day of January, one thousand nine hundred and five, under "The Ontario Companies act," being chapter 191 of the Revised Statutes of Ontario, 1897; and whereas the said company has prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The company may construct, develop, acquire, own, use, and operate the water power now or hereafter existing on the Rainy River at or near the town of Fort Frances, in the district of Rainy River, in the Province of Ontario, and construct, develop, operate, and maintain works, canals, raceways, water courses, dams, piers, booms, dikes, sluices, conduits, and buildings in connection with the said power, including any increase of the said power on Rainy River by storage or other works on waters tributary to Rainy Lake which the company now has or may hereafter have power to construct: *Provided*, That no work authorized by this section shall be commenced until the plans thereof have first been submitted to and approved of by the governor in council.

2. The company shall from the said water power, including any increase thereof from time to time, provide power or electrical energy for use on the Canadian side of the international boundary line

concurrently as it provides power or electrical energy for use in the United States, so that from time to time, except as herein provided, there shall not be less of the said power or electrical energy available for use on the Canadian side of the international boundary line than on the American side; and, subject to the provisions of this act, such power or electrical energy shall be delivered on the Canadian side as and when demanded.

3. The power house, generators, transmitters, machinery, appliances, and connections necessary for the delivery by the company of such power or electrical energy for use on the Canadian side of the international boundary line shall be on the Canadian side thereof.

4. In case of any dispute as to the price for power or electrical energy in use or to be provided for use upon the Canadian side of the said international boundary line, or the methods of distribution thereof, or the time within which or the conditions upon which the same shall be furnished for use, such dispute shall, notwithstanding the provisions of section 13 of the railway act, 1903, be settled by the board of railway commissioners for Canada on the application of any user or applicant for power or of the company or of the town of Fort Frances.

5. No part of the power or electrical energy to be provided under this act for use upon the Canadian side of the said boundary line shall be diverted to or used in the United States without the order of the said board of railway commissioners, made on application of which two weeks' notice in writing shall have been served upon the mayor and clerk of the town of Fort Frances, or in the absence of either one of them, upon a member of the town council in his stead.

6. The said board of railway commissioners shall have full jurisdiction to inquire into and hear and determine any application of the company for leave to make such diversion, and if, and so often as, it appears to the said board on such an application that there is not a reasonable prospect of the utilization within a reasonable time of power or electrical energy unemployed, though actually available for use, on the Canadian side of the international boundary line the board shall make an order permitting the diversion of the whole or part of such unemployed power or electrical energy, and may impose such terms and conditions, including the fixing of the time during which such diversion may continue, as the board may deem expedient.

7. The board may order and require the company or any person to do forthwith, or within or at any specified time, and in any manner prescribed by the board, so far as is not inconsistent with this act, any act, matter, or thing which such company or person is or may be required to do under this act, and may forbid the doing or continuing of any act, matter, or thing which is contrary to this act; and shall have full jurisdiction to hear and determine all matters, whether of law or of fact, and shall, as respects the attendance and examinations of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction under this act, or otherwise for carrying this act into effect, have all such powers, rights, and privileges as are vested in a superior court.

8. The practice and procedure under this act on applications to the board shall be as nearly as possible that followed on applications thereto under the railway act, 1903, and otherwise shall be subject to the direction and control of the board.

Speech of Hon. Henry M. Teller, of Colorado, in the Senate of the United States, Tuesday, March 31, and Thursday, April 2, 1908.

FEDERAL JURISDICTION OVER NAVIGABLE STREAMS.

The Senate, as in Committee of the Whole, having under consideration the bill (H. R. 7618) to authorize the Benton Water Company, its successors or assigns, to construct a dam across the Snake River in the State of Washington.

Mr. TELLER. Mr. President, I should like to submit some remarks on this bill, or on the law touching this proposition, and I will do so now, with the indulgence of the Senate.

The bill involves, directly and indirectly—perhaps more indirectly than otherwise—a very important constitutional question. It is a question that, to my mind, is very clear, and it has been disposed of by the Supreme Court of the United States on sundry occasions, some of the decisions being at least sixty-five years old.

Recently there has grown up a new idea in this country—and it has been very prevalent in the last few years—that whatever might be suggested to be for the public interest should be carried on by the General Government without reference to whether there was authority to do it or not. I am inclined to make some remarks that I would not make, perhaps, on this bill or any other, if it were not for the repeated assertion that has been made in high public circles that whatever ought to be done we should find a method of doing.

Not long since the Secretary of State—and I am going to send to the desk and have read his remarks, as I have taken them from the public press and I have no doubt they appear therein correctly—in an address called attention to the fact that the States were not exercising the powers conferred upon them by their constitutions and recognized by the National Government as pertaining to them, and he said when they did not do so they must not complain if the Congress should assume the right to do what they had failed to do. As that spirit seems to be a very general one now, and is very prevalent, I want to say a few words about it. I want, in the first place, to have read at the desk an extract from the public press.

The VICE-PRESIDENT. The Secretary will read as requested, in the absence of objection.

The Secretary read as follows:

Extracts from the speech of Hon. Elihu Root, Secretary of State, delivered at a banquet given by the Pennsylvania Society, in New York City, on December 12, 1906.

Mr. Root said in part:

"If any State is maintaining laws which afford opportunity and authority for practices condemned by the public sense of the whole country, or laws which through the operation of our modern system of communications and business are injurious to the interests of the whole country, that State is violating the conditions upon which alone can its power be preserved. If any State maintains laws which promote and foster the enormous overcapitalization of corporations condemned by the people of

the country generally, if any State maintains laws designed to make easy the formation of trusts and the creation of monopolies, if any State maintains laws which permit conditions of child labor revolting to the sense of mankind, if any State maintains laws of marriage and divorce so far inconsistent with the general standards of the nation as to violently derange the domestic relations which the majority of the States desire to preserve, that State is promoting the tendency of the people of the country to seek relief through the National Government and to press forward the movement for national control and the extinction of local control.

"STATES NOT ALIVE TO DUTY.

"The intervention of the National Government in many of the matters which it has recently undertaken would have been wholly unnecessary if the States themselves had been alive to their duty toward the general body of the country. It is useless for the advocates of State rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the States themselves fail in the performance of their duty.

"The instinct for self-government among the people of the United States is too strong to permit them long to respect anyone's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control could better be exercised in particular instances by the governments of the States, but the people will have the control they need either from the States or from the National Government, and if the States fail to furnish it in due measure, sooner or later construction of the Constitution will be found to vest the power where it will be exercised, in the National Government."

Mr. TELLER. The words "United States of America" describe to the world the nation known as the United States.

It has a written Constitution, the preamble of which provides:

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

It is a Government of delegated, limited, and enumerated powers. And every exercise of power by the nation must find its authority in the Constitution of the United States as originally adopted or in the amendments thereto.

When I speak of the Government as one of delegated, limited, and enumerated powers, I do not in any way deprecate it or deny to it such powers as are provided for in the Constitution or that must follow such enumerated power in order that there may be an efficient exercise of the power specifically declared.

But I can not agree to the doctrine, now somewhat popular, that by legislative or judicial construction powers certainly withheld may be exercised, because such exercise may be beneficial, or because powers withheld to the people or to the State may not be exercised, or if attempted to be exercised, may not be so exercised as to meet the approval of the executive, legislative, or judicial departments of the Government.

I do not stand for any hair-splitting theory, but for a fair and honest determination. What did the framers and makers of the Constitution intend to authorize to be done?

However desirable it may appear to me that certain powers ought to have been given to the Executive or Congress, the question is, What did the creators of the Constitution, that is, "We the people * * * do ordain and establish the Constitution"—what did they mean to do? And the only way to determine what they meant to do was by what they did do.

We can never consider the question properly unless we consider the conditions at the time the Convention was held to form the Constitution, and what defects in the then existing Government were to be cured by the change in the character of the Government.

It may seem to be a waste of time to detain the Senate with a statement of the conditions of the United States at the time of the assembly of the Constitutional Convention, and it may appear to be a reflection on the intelligence of the Senate to call attention to what ought to be and doubtless is well known to us all.

But, Mr. President, we have reached a period in our country's history unlike any other period to which we can point.

We are met with the declaration not once, but many times, from those whose duty it is to discharge high and important public duties, that their efforts are obstructed by a lack of administrative power. Evils are pointed out that ought to be suppressed, but the inquiry is, Where is the authority to do it. And if we point to the powers of the States, we are told the State will not do it. Evils have been pointed out that should be remedied. Congress has been admonished to find some way by which such evils can be remedied or checked, and we have been told that Congress ought to find out some way to do it, some way not apparent to our advisers, nor to us.

If it is asserted that the United States as the proprietor of the public lands becomes the owner of the water of the nonnavigable streams flowing over or along its land, the Government has by its legislation authorized the appropriation and use of the water of such streams; and the courts of California and the United States have treated the prior appropriation of water on the public lands of the United States as having the better right than the subsequent appropriator, on the theory that the appropriation was allowed by license of the United States and after 1866 by statutes of the United States. (Lux *v.* Hagan, 10 Pacific Reporter, p. 721.)

And if the State does not own the water of the nonnavigable streams, the United States, as owner of the public lands, must, under the common-law rule of riparian ownership, when it conveys its right to the soil, conveys its right to the water, and the holder of the patent becomes the owner, and the Government has by such patent ceased to be the owner of such water. (10 Pacific Reporter, supra, 722.)

Unless running water (not navigable) is reserved, it passes by grant or patent, supra.

Mr. President, it will be noticed that the Secretary of State does not indicate that there is any proposition to amend the Constitution. The last utterance read would indicate that he expected this change to be made by construction, and whether that construction is to be given by the legislative department, the executive department, or the judicial department is somewhat uncertain from his words.

I do not think that to a body which is composed largely of lawyers I need say that it is not possible, either legally or morally, to change the Constitution of the United States by construction. We may differ as to what the Constitution means. The Supreme Court may one day say that it means one thing and another day that it means another thing; but there has never been any court yet that has attempted to construe the Constitution except to construe it according

to its meaning. No court has ever said "It ought to mean this, and therefore we will hold that it does." That is the theory upon which of late appeals are made to us to act.

The President of the United States not long since in addressing Congress said there were certain evils that Congress ought to find a way to remedy. The duties and the powers of Congress are carefully delineated in the Constitution of the United States; and if we have sometimes, perhaps, proceeded contrary to that delineation, we could rely upon the courts to determine whether we kept within the constitutional limit or whether we exceeded it.

The Secretary of State is one of the most illustrious lawyers in the United States, and I have no doubt, if the question were put to him, he would say frankly "you must proceed according to the Constitution to make any change in the general theory of the Government." But, in accordance with the general idea that we have not time to amend the Constitution when it needs it, you must find your remedy now, right away, and you can possibly find it by the enactment of some law here, subject, of course, to the supervision of the Supreme Court of the United States, or it is possible that the Supreme Court of the United States might determine also that they had power to construe the Constitution differently from what their predecessors had done or differently from what it means; but up to this time that never has taken place, and I do not suppose the time will ever come when the Constitution of the United States will be construed by the Supreme Court except in accordance with its terms and its original meaning.

It would seem to be unnecesary for me to say that the powers of the General Government are limited and restricted by the Constitution of the United States, and that no power can be exercised by the General Government unless the authority for its exercise can be found positively in the Constitution, or properly inferred from what is in the Constitution. There is a pretty general rule of law among lawyers—and it has been sanctioned by the Supreme Court on more than one occasion—that a statute absolutely clear in its meaning can not be construed otherwise than in strict accordance with its language, and statutes that do not admit of any controversy need no construction whatever.

Mr. President, I want now to approach this question of the power of the General Government over the States. I know that State rights is not a very popular idea; I know very well that when you speak of State rights you array against you an old prejudice which has existed for many years, and which culminated in its intensity during the great civil war and immediately thereafter; and yet the hope and the expectation of this country must be in the perservation of the State governments. I will not take much of the time of the Senate to go into that. I only want to say that the forty-six sovereignties who come, each of them, nearer to the people of their respective jurisdictions than does the General Government, are better calculated and better qualified to maintain order and peace within their respective boundaries—and that is the great purpose of State governments—than is the General Government. When the time comes that the people in New England shall determine what the people of Oregon and of Washington shall do locally, and when the people of Oregon and Washington shall determine what the

people of New England shall do locally, we shall be practically at the end of this Government of ours.

We ought to pay some heed to the lessons of the past. There has never been in the history of the world such a confederation of sovereignties as that which exists in this Government of ours; but, Mr. President, there have been innumerable confederacies of a different character that have existed and flourished for years and then have fallen. I venture to say now—and history will bear me out—that in practically every case where there has been such a confederacy and it has been ultimately dissolved, it has been dissolved because of a failure to respect the rights of each individual member of the confederation.

No people in the world probably were better qualified at one time for self-government than were the Greeks. They organized a confederacy that lasted for a few years, and when it disappeared it disappeared because Athens, the great city of intellectual culture and of art, became the oppressor of the other members of the confederacy, who no longer felt that they were allies, but subjects. So, when the Persian power came down on Greece, those who were dissatisfied with the ruling power of their own confederacy either withheld their assistance from Athens or took the other side. Then the confederacy of Delos, perhaps the most remarkable in all history, disappeared simply because there was not that cohesion which is necessary to maintain, and always has been necessary to maintain, different confederacies or different national associations.

I am not particularly careful, perhaps, about the word "confederacy." It is quite immaterial whether we are a confederacy in the strict sense of the term. We have retained for the States the right to do certain things. We speak of these frequently as the police powers. There are certain things that we can not take away from the States, and we can not increase their rights. That is one of the things that is settled and distinctly understood.

I am not one of those who would minimize in the slightest degree the national power. I have believed for many years that in all questions appertaining to national affairs this Government of ours is as supreme as any other government in the world in times of war and in times of peace.

Mr. President, I remember a few weeks ago a distinguished member of the Supreme Court of the United States made a speech in the city of New York in which he said that the National Government is supreme in all things appertaining to nationality, and the States are supreme in all things appertaining to the States. I intended to present that as an epitome of the real theory of this Government, but I mislaid my copy. It was the justice from Kentucky, Mr. Harlan, long on the bench, and who by his devotion to duty and his well-known patriotism has shown himself the peer of any man who has sat on the bench, in modern times at least. That ought to be the watchword. The Federal Government should exercise all of the powers necessary for the General Government; the State should exercise all the powers necessary for local administration and local affairs.

The proposition before us here to-day is to build a dam on a navigable river. I do not deny the power of Congress to authorize the building of a dam on a navigable river, with locks and canal so as not to obstruct navigation. It has been done on several occasions.

It has been done in a number of cases recently. That is not the question. Should the Government of the United States authorize the building on its rivers of dams that in any way might interfere or disturb its constitutional right to control the navigation of the stream? We have fallen into an idea that if the lower waters of a river are navigable the river is navigable to its source. In other words, we have fallen into the idea that if the Government has control over the first 400 miles of a river, it ought to have control over the upper and farther end. That is not the law. Under the English rule, the civil law, rivers are navigable as far as the tide ebbs and flows and no farther. Our rivers are navigable just as long as a boat can traverse them, and the Supreme Court has so held.

Nobody in any of the States or in any section of the country denies the right of the Government of the United States to control the commerce of the rivers and the Great Lakes. The question is, Under what conditions must it be controlled? The Government may control them in every possible way that is necessary for commerce. In other words, the Government may control the agencies of commerce, but the Government has not any control over the river, nor has the Government any control of the land under the river.

I assert that as having been decided by the Supreme Court more than sixty years ago and repeated at least thirty times since, and I have here, and shall present before I get through, the law on the subject. How it happens that anybody in these days should suppose that the Government of the United States owns the waters and the rivers, navigable or nonnavigable, I can not conceive, in view of the fact that the courts have held for so long, and every law writer of any consequence in this country, taking Story, taking Kent, and all that class of men, have asserted the doctrine that the waters of a river and the waters of arms of the sea belong to the State and do not belong to the General Government. The Supreme Court very early determined that the right to fish, to plant clams and to gather them was to be controlled by the States and not by the General Government.

I wish to make another statement for which the authorities will bear me out. The Government of the United States can not obstruct a national river. I mean by a "national" river a river that is entitled to be called a "navigable" river. It has no more power to do that than a private citizen—not a particle. Whether I shall present authorities for that or not I am not certain, in the multiplicity of cases that I am going to call attention to, but it can be found in the decisions of the court and in the early law writers upon the subject.

Mr. President, I do not want to spend too much time, yet I must take a minute to call the attention of the Senate to the adjudications that have been made by the court. One of the last cases decided by the Supreme Court was that of the State of Kansas against the State of Colorado. It was not a very satisfactory decision in some particulars, but it decided some things positively. This is what is decided in that case: That the State may determine whether the old doctrine of the common law as to streams shall prevail or another and different rule; that this is a Government that can claim no powers not granted to it by the Constitution; the Government of the United States is one of delegated and limited and enumerated power. (See p. 13 of the opinion in pamphlet.)

It is still true that no independent and unmentioned power can pass to the National Government or can be rightly exercised by Congress. (P. 13 of pamphlet.)

Referring to the second paragraph of section 3 of Article VIII, which gives Congress power to dispose and make all needful regulations respecting territory and other property of the United States, the court says:

> But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over property belonging to the United States within their limits. (See p. 14.)

But the proposition that there are legislative powers affecting the nation as a whole, which belong to although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a Government of enumerated powers (p. 14).

RECLAMATION.

The court sustains the reclamation laws because the Government is the owner of large areas of land within the States where the system is to be applied, and specifically declares that this system could not be applied to States where the Government did not own land (p. 16); but did not declare the water belonged to the United States, and said nothing that can authorize its control by the Government as against the State.

But in sustaining the law of reclamation, the court says:

> We do not mean that its legislation can override State laws in respect to the general subject of reclamation (p. 16).

That the land under the streams navigable both above and below high tide belongs to the States, and, speaking of such lands, the court says:

> It properly belongs to the State by their inherent sovereignty. Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with national regulations concerning public navigation and commerce (p. 17).

Again, the court says:

> It (the State) may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the West of the appropriation of water for the purpose of irrigation shall control (p. 17).
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> Congress can not enforce either rule upon any State (p. 17).

The court in Kansas *v.* Colorado decided that the States owned their own waters, and it decided also that if a State did not choose to recognize the old common-law riparian rights the State had the power to change the law. Perhaps I need not dwell on that, but it is important in determining what are the rights of our Western States when it comes to the question of irrigation. We have abolished in most of the Western States the doctrine of riparian rights. The constitution of Colorado and that of some other States, although I will not undertake to say now of which States, provide that the water of the State belongs to the people of the State, and is under the control of the State and is not under the control of the people owning the land abutting on the rivers or streams.

The Supreme Court in the Colorado-Kansas case say that that is a right which belongs to the States to determine. We determined that.

Wisconsin determined in 1846, if I recollect correctly, that the water belonged to that State. I think every State in the western country where the question has ever been presented has so declared. Wisconsin declared it by statute. I think I could quote some others, but I am not going to try it.

Mr. President, there is another thing that I want to call attention to, which I think is very essential for us to understand. The Western States which are now young in years are sometimes supposed to have come into the Union on conditions different from those attaching to the original thirteen States. The Supreme Court has declared again and again that every State is the equal of every other State under the law, just as we say here that every Senator is the equal of every other Senator under the law. It may be a new State; it may be the last State; it may be the smallest in population or it may be the greatest; it has no other rights than any other State, and it rests under no burden that every other State in the Union does not rest under.

When a State is admitted to the Union it is on an equal footing with the original States. This is usually, if not always, so declared in the act of admission, but if that is not done, the situation or relation of the new State is the same as the other States, and the Supreme Court of the United States has repeatedly so declared.

I believe that every State that has been admitted—certainly all that have been admitted since I have had any knowledge of the matter—has come into the Union with a declaration that it came in on an equal footing with the other States. The Supreme Court in 1842 declared that Alabama was admitted exactly like and had the same power and was under the same obligations as the other States which came in under the original compact—the thirteen original States. An effort was made to show that there were some reasons why Alabama might have come in on different conditions and might stand on a different footing from the others. The court laid it down squarely in a case I shall cite later that Alabama had the same rights, not because there was a difference in the condition, not because she had been ceded by Georgia to the United States, but because of the fact that all the States were to come in on equal footing when they came in, and every State should stand alike in power and in right.

Now, of courst, in the original States there was no Government land. The old original States owned the land, or if they did not, the people inside the States owned the land. There was no public land in the old original thirteen States. Virginia had a very large tract of land that was ceded to the United States; Connecticut ceded; Massachusetts ceded some land to the United States. That was mainly or perhaps entirely in Ohio.

Mr. President, the United States became a great landowner, and that is what I want to call attention to for a few minutes. It became a great land proprietor. I find that a good many of our people in these days suppose the Government of the United States holds this land as a sovereign. The Supreme Court has said and repeated it again and again that this nation holds its land not as a sovereign, but as a proprietor. We do not tax the public land. We do not tax it because we stipulated that we would not tax it. Both Judge Sawyer and Judge Field, who were both Federal judges, but prior to being Federal judges were California judges, have declared that but for that provision saying we would not tax the land, the Government of

the United States would be compelled by law to pay taxes on the land, because the land was not held to perform a Government function. If it had been, there would have been a different ruling on that subject. The Supreme Court has said it so often that it is hardly worth while for me to cite what they have said about it. I want to read just what was said in the California case by Judge Sawyer, who is now dead, but who, I think, we all recognize as one of the great lawyers of this country. Judge Sawyer, in the case of People *v.* Shearer (30 California, p. 658), said:

> If it had not been for the stipulation to the contrary in the act of admission, the United States might have been required to pay taxes on the land owned by it situate within the limits of California, like any other proprietor of land. The relation of the United States to the public lands since the admission of California into the Union is simply proprietary—that of an owner of the lands, like any citizen who owns land, and not that of a municipal sovereignty.

See also 5 Minnesota, State *v.* Batchelder, page 234; 2 Minnesota, Camp *v.* Smith, page 155; and 12 Iowa, Stockdale *v.* Treasurer of Webster County, page 538.

Judge Field declared it when he was on the State bench, and he reiterated it from the Federal bench.

Of course there has been an argument made and frequently made that because the King of Great Britain held all of the lands and the title was in the King it must be that the Government of the United States, being the sovereign, held the land as the sovereign. It has been so often declared by the court to be otherwise, in accordance with the decisions I have just read, that contention must be abandoned. We can not draw any inference from the fact that the King of Great Britain could parcel out the land and even sell the land under the rivers and bays. That can not be done by the United States. Neither can it be done by the States, according to the rulings of the court. I want to read from Angell on Tide Water. This is an authority which at least in former times was considered entitled to credit. I do not know whether it is now or not, but it was fifty years ago, when I was a law student.

> These inherent privileges are those of navigation and fishery, privileges which are classed among those public rights denominated "jura publica" or "jura communia." Those are contradistinguished from "jura coronæ" or the rights of the Crown. They are said to exist of common right, which, according to Sir Edward Coke, is only another epithet for common law. The common law of England is known by the various appellations of "right," "common right," "public right," and "communis justitia." When, therefore, it is said a man has a thing by common right, it is understood that he has it by common law. The common law is furthermore denominated common right because it is the common birthright or inheritance which people have for the protection and safeguard of their privileges. "And it is the excellency," says Sir Edward Coke, "of common law that the receding from the true institutions thereof introduces many inconveniences, and that the observation of it is always accompanied by peace and quiet, the end and center of all human laws." (Angell on Tide Water, pp. 22 and 23.)
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> The right of property in tide waters, and in the soil and shores thereof, is "prima facie" vested in the King, to a great extent at least, as the representative of the public. To such an extent that to the right of navigation and fishery he has not other claim than such as he has as protector, guardian, or trustee of the common and public rights. Hence, the King has no authority, and since "magna charta" has never had, to obstruct navigation or to grant exclusive rights of fishing in an arm of the sea. (Angell on Tide Water, p. 22.)
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> And by the law of nations the use of the shore is also public, and in the same manner as the sea itself, and for this reason any person is at liberty to place a cabin there,

in which he may harbor himself, and for the like reason to dry nets and draw them from the sea. By the common law, the waters of the sea and the shores of the same are as much subject to public use as they are by the civil law; but the essential difference above referred to between the two relates to what is just mentioned as the doctrine of the civilian, viz, that such waters are the property of no one. The policy of the common law is to assign to everything capable of occupancy and susceptible of ownership a legal and certain proprietor, and accordingly make those things which from their nature can not be exclusively occupied and enjoyed the property of the sovereign. The King in England is regarded as the universal occupant, and the presumption is that all property was originally in the Crown. Hence, it is said that all lands are holden mediately or immediately from the Crown, and that the King has the "absolutum et directum dominium"—a fiction of law adopted not for the aggrandizement of the throne, but for the benefit of the subject. (Angell on Tide Water, p. 22.)

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Every reader of history knows that the King was not the original owner of the soil. The original owner of the soil in Great Britain and for a thousand years after the Romans settled in it were the people who occupied it and used it.

In the case of Smith *v.* Maryland (18 Howard, p. 74) Justice Curtis said:

Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the Declaration of Independence. * * *

But this soil is held by the State not only subject to, but in some sense in trust for, the enjoyment of certain rights, among which is the common liberty of taking fish, as well shell fish as floating fish.

While the State may own and does own the lands under these tide waters, it can not part with them in such a way as to interfere with navigation of the waters.

In the case of United States *v.* William G. Cornell (2 Mason, p. 60), opinion by Justice Story, is found the following:

The purchase of lands by the United States for public purposes within the territorial limits of a State does not of itself oust the jurisdiction or sovereignty of such State over such lands so purchased.

Mr. President, I want to show before I get through that the withholding the land from sale does not give the Government of the United States any right over it except that of a proprietor, except under that provision of the Constitution which authorizes Congress to dispose of and make all needful regulations.

Justice Story says further:

Exclusive jurisdiction is the necessary attendant upon exclusive legislation. The Constitution of the United States declares that Congress shall have the power to exercise "exclusive legislation" in all "cases whatsoever" over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

There is not a man here who does not know that the fact that the Government has the title to the soil does not give it exclusive rights to govern it and does not deprive the State of its jurisdiction over it, because the courts have settled that often, as I shall show before I get through.

Justice Story continues:

When, therefore, a purchase of land for any of these purposes is made by the National Government, and the State legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, ipso facto, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted.

The United States may build a building, putting in any amount of money it may choose, and the State jurisdiction is not lessened or

impaired in the slightest degree unless the State so declares it shall be. Justice Story also said—this is a declaration which I have no doubt some of our friends would question, but I believe it is the law, and I believe it can be supported—

> For it may well be doubted whether Congress are, by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature where such consent is so qualified that it will not justify the "exclusive legislation" of Congress there.

We have taken some land, you know, the State reserving to itself a quasi jurisdiction over it, and Story says in this very case I have cited that it is doubtful whether the Government can hold it under that quasi relation, but the Supreme Court, in what I shall call the "Leavenworth case," which I will cite later, held that such could be done.

Mr. President, fifty years ago Chancellor Kent was supposed to be good authority for almost any proposition of law. I myself doubt whether there has been any man in the United States since his death who was better qualified, or as well qualified, to determine questions of this character. In his lecture on real property he says:

> The sovereign is trustee for the public, and the use of navigable waters are inalienable. But the shores of navigable waters and the soil under them belong to the States in which they are situated as sovereigns. (3d vol. Kent, 13th ed., p. 427; Pollard *v.* Hagan, 3 Howard, 212; Canal appraisers, 17 Wendell, 571; Gavit *v.* Chambers, 3 Ohio, p. 496.)

Mr. President, I do not want to take up the question and distinguish very much our condition in those States from some others. I am speaking now of the arid West. Our condition is different from what it is in other parts of the country. There are some sections in the State of Colorado that were under irrigation before Columbus discovered America. There are plenty of lands in the Territory of New Mexico and some in the Territory of Arizona that had been watered and cultivated under the laws then existing, crude as they may have been, long before Columbus sighted land in his famous voyage.

The use of water for irrigation in the arid region is a natural want, and the supreme court of the State of Illinois, in the case of Evans *v.* Merriweather (3 Scammon, 495), where irrigation has never been very practical, says:

> In a hot and arid climate water, doubtless, is absolutely indispensable to the cultivation of the soil, and there water for irrigation would be a natural want.

I want Senators to keep that in mind. There is not a Western State that has not thousands of acres which, while the climate may not be torrid, fall under that description, and the use of water there for irrigation is a natural want.

In Evans *v.* Merriweather (3 Scammon, p. 495) the court said as I have read. Then the court adds, on page 496:

> From these premises would result this conclusion: That an individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary, to satisfy his natural wants. He may conserve all the water for his domestic purpose, including water for his stock.

So far, then, as natural wants are concerned, there is no difficulty in finding a rule by which riparian proprietors may use flowing waters to supply such natural wants.

Mr. President, that is the law in a country where the riparian doctrine is in force.

Mr. PILES. Will the Senator permit me to interrupt him for a moment?

Mr. TELLER. Certainly.

Mr. PILES. I would just like to ask the Senator if I am understanding him correctly. I understand the Senator to make the point, or he is leading up to the point, that it is not within the power of Congress to charge for water taken out of the navigable rivers of the United States for irrigation purposes.

Mr. TELLER. I will say that that is my position, and I will demonstrate before I get through that it is absolutely absurd for Congress to claim the right to charge for water.

Mr. PILES. I am not antagonizing the Senator's position. I just wanted to get his line of thought as I thought I had it in my mind.

Mr. TELLER. I understand. I am going even further, for I am going to say it is absolutely not in the power of this Government of ours to prevent a citizen of my State from using the water for his natural wants, and that is irrigation. The Government might control it when we were a Territory, as they attempted to do, and did do. The Government may control how the water shall be carried across its lands; but when it comes to the beneficial use, the State only can detemine how it shall be used and what use shall be made of it.

Mr. PILES. Then, as I understand the Senator, he takes the position that it is not within the power of Congress to exact a charge for water taken out of a navigable river for either power or irrigation, or in fact, for any other purpose; he contends that that power belongs solely to the State.

Mr. TELLER. The Government has not the slightest interest in the water, not even in the navigable waters.

Mr. PILES. I get the Senator's position.

Mr. TELLER. The court has said that all the Government has in navigable water is an easement, the right to run a ship or a boat over it, the right to see that it is not obstructed. Of course that follows its right to regulate commerce.

Mr. PERKINS. Mr. President——

The PRESIDING OFFICER (Mr. Dillingham in the chair). Does the Senator from Colorado yield to the Senator from California?

Mr. TELLER. I do.

Mr. PERKINS. May I ask the Senator from Colorado his construction of the law or if the courts have decided it in a case where the of a stream source is in one State and it flows through that State into another State or another Territory? Has the first State a right to appropriate the water and to deprive the second State through the stream passes of the water?

Mr. TELLER. The court has held the right of the people of the State to use the water. There has not been a case, I will admit, where all the water has been appropriated, but the case that I cited from 3 Scammon, Evans *v.* Merriweather, holds that the man who has a running stream through his farm may use it all and let his neighbor go dry.

In England and in Massachusetts a man may, by appropriation, which is supposed to mean a grant originally, take out the water of a stream and absolutely control it to the extent that nobody else has

anything to do with it. He can build a mill race, and if he has held it twenty-one years in New England and twenty-one years in England he becomes the absolute controller of that water.

Mr. President, much more is that the case in a country where the whole question depends as much upon water as upon air. You could no more live on thousands and thousands square miles belonging to the United States unless you could put water on it than you could live if the air should be taken away. To take away the water would be equivalent to taking away your life.

Mr. PILES. I should like to ask the Senator from Colorado if he contends that it would be within the power of a neighboring State, subject to the paramount right of navigation, to dispose of the waters of a river flowing through the State to such an extent that there would remain no water in the adjoining State which might be used or disposed of by that State for irrigation or power purposes, because there would not be sufficient water, we will say, remaining in the river for that purpose without disturbing the navigation of the river?

Mr. TELLER. If the use of water for irrigation is a natural want, then the first appropriator may use it all, even to the destruction of those differently situated persons, just as you may save your life even at the expense of another.

That brings me to the question of what Congress has a right to do and what Congress would do if such a thing occurred. That question has never yet arisen. It probably never will arise.

Mr. PILES. I merely want to get the Senator's view on that point.

Mr. TELLER. I will take the Arkansas River. It runs a couple of hundred miles in Colorado; it runs down into Kansas, then it runs into Arkansas, and then it runs into the Mississippi and into the sea. That is not a navigable river until you get into lower Arkansas and in the Indian Territory. Then it becomes a navigable river.

This question might be presented, Mr. President. I want to be fair about it. Suppose that was a navigable river on which there was a great commerce up near Oklahoma, say, in the Indian Territory, and suppose Kansas and upper Arkansas and Colorado should use all the water so there was no water along in that river. Then it would be a question as to what, under the power to preserve commerce, the Government could do. What do you suppose, Mr. President, a government would do? You must presume that whenever you legislate in Congress you legislate with respect to the interests of the whole people—the greatest good to the greatest number. If you have a million people in Kansas, a million people in Colorado, and a half million more perhaps in Arkansas using his water, would anybody suppose that the United States, unless there was a tremendous necessity for it, would intervene and say you could not use that water? Would you make it a desert? That is the question the Supreme Court put the other day in the Colorado case. They did not decide it; they only said that is where it might go. We have not got there because we have never used all the water of that river; it has run across into Kansas. We have minimized it, they say, somewhat; we have not destroyed it; but in ten years after the irrigation begins the river where it crosses the line will be a larger river than it was before, except in flood time.

Mr. President, I will be diverted a moment just to mention one thing that has happened in my part of the country. We have an

irrigating country. We have irrigated there for forty-five years. I do not like to bring myself particularly into evidence in a matter of this kind, but I have had absolute, actual, positive knowledge of irrigation for almost fifty years. I have seen water spread out on the land, and I have seen the desert where there was not grass enough to keep a goat on an acre selling for $200 an acre because of its fertility by the use of water. This is in the State of Colorado. Our farmers this year had $11,000,000 paid to them for beets that they have raised on irrigated land. Twenty million dollars will be paid in Colorado this year, and not a beet would have been raised, not a pound of sugar would have been made, except for the fact that we were allowed to use the water that flows down eventually into the Mississippi River and thus goes into the sea.

Could a better use be made of it, Mr. President? We have built up there a civilization that has no superior on the American continent. From Denver to Fort Collins, 75 miles, there is an unbroken farm. I doubt whether there is to-day another equal area in the United States that would sell for as much money or that will produce as much to the men who till it. Without water, I repeat, it would be a desert. I have seen it when it would not produce anything but the wild grass, and not much of that.

I am not going to be anxious as to what will happen when we have used up all the water, because we know that Congress will never make a desert of a country like that in order that a few boats may run on the lower Arkansas River. I do not know but the Government could do it, but a government that would do that would not last very long, in my opinion.

Mr. President, I did not intend to take up the irrigating question, but I am brought into it by the suggestion made by the Senator from Washington, which is one that has presented itself to me many times. I prepared an article on that subject. I said when we have destroyed the commerce on any river, then it will be time enough for the Government to complain, and then the question will be, What will the Government do? I assume that it would do what an individual would do. If an individual owned the whole property, he would preserve that which was the most beneficial to the human race.

Mr. President, we are met now by the claim that the Government of the United States owns the water in the State of Colorado; that the Rio Grande River, a river running into the Gulf of Mexico, is under the control of the United States. I deny that. I deny that the Government of the United States has any control over the water that is in the State. It has of course absolute control over the water of the Territory of New Mexico, and that question probably will be presented some day. There is a little boat down on the lower Rio Grande River running up 70 miles from the Gulf once a week. Mr. President, there is more for human happiness in a square mile of irrigated land in New Mexico than there is in running a boat once a month or once a week or once a day on that river. The great interest of the agriculturists will give way when the time comes, if it ever does come, not while the people are sane, but only when power shall simply desire to exercise itself to show what it can do. That time will never come, in my opinion, in the Congress of the United States.

Mr. President, I have been somewhat diverted, but I do not know that I care; it gives me at least an excuse for saying some things that

perhaps I would not otherwise say. I appeal to some Senators who hear me. I know that they have seen the same things that I have. I know that the California Senators have seen it. I know that they have seen a country made a garden where it was a desert. I have been in the Territory of Arizona and have seen where there was no more grass on an acre than there is on this floor to-day, and yet I have seen in ten or twelve years the country blossom. I have seen fine roses; I have seen lemons, oranges, figs, grapes, and dates growing where a few years ago there was an absolute desert.

Mr. President, one-third of this whole country must be irrigated, and when it is irrigated that third will produce more that goes to make life endurable in the country than the remaining two-thirds. In the country west of the Mississippi River, not all arid, but more than three-fourths of it arid, we produce more than one-half of the wheat of the United States. We produce more cattle than any other section of the country. We produce more sheep. We produce nine-tenths of the wool that is produced. Are you going to dedicate a country like that to silence and solitude because the Government of the United States has control of the waters? I deny that the Government has control, and I deny, too, that you would do it even if the Government had control. Our safety lies, and we intend to stand by it, in holding that the water belongs to the State and that we mean to keep it.

Mr. President, I want to cite another authority as to the proprietorship of the United States simply in its lands. If the Government of the United States is the sovereign and holds it by sovereign power, then we are the serfs of the General Government. We are not.

I have another California case. I cite this, for that was the first section of the country where irrigation began in earnest, except the little that was in New Mexico, Arizona, and in southern Colorado, which was exceedingly small and of but little value. As I said, undoubtedly that had been in existence long before the discovery of America.

Mr. SUTHERLAND. Mr. President, I call the attention of the Senator from Colorado to the fact that irrigation in the Western country began in my own State, before it did in any other State, before it did in California. As early as 1847 the people of Utah were successfully irrigating their land.

Mr. TELLER. Mr. President, I overlooked that, because the Utah people did not make quite as much noise over it as our friends from California did.

Mr. SUTHERLAND. We never do.

Mr. TELLER. But, Mr. President, I can testify in support of my friend from Utah. I saw almost fifty years ago the irrigation of Utah. It was the first large irrigation I had ever seen, or which, I think, perhaps, at that time, any American had seen, because California was really a cattle country for many years and not an agricultural country.

What I have said about Colorado as to prosperity may be said about some parts of Utah, and many parts of it, too, for that matter.

Judge Sawyer, in the case of Woodruff *v.* North Bloomfield Gravel Mining Company (18 Federal Reporter, p. 772), said:

Upon the cession of California by Mexico—

Mr. President, I cite this because some people will say, as I have heard it said:

Why, of course there is a difference between the land that was ceded by Virginia to the Government and the land that the Government got from Mexico.

I want to show that the doctrine is the same:

Upon the cession of California by Mexico, the sovereignty and the proprietorship of all the lands within its borders, in which no private interest had vested, passed to the United States. Upon the admission of California into the Union, upon an equal footing with the original States, the sovereignty for all internal municipal purposes, and for all purposes except such purposes and with such powers as are expressly conferred upon the National Government by the Constitution of the United States, passed to the State of California. Thenceforth the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the State, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject to taxation. In all other respects the United States stood upon the same footing as private owners of land.

Mr. President, that has been the law repeatedly declared in other cases. Again, it was said in the same State, but in the Federal court, by the Supreme Court of the United States:

This is a government by law and not by men.

By this it is meant that the Government must be administered by laws enacted by the proper authority—that is, by the legislative department.

This means that no man, whatever his position may be, can substitute his will or his opinion for the law. If he is an executive officer, he must be governed by law. He must act in accordance with the law as declared by the legislative department.

The ninth circuit court has said:

As to nonnavigable waters, Congress has nothing to do with them beyond the rights of the United States as a riparian proprietor, which are the same as the rights of other riparian proprietors, except it might limit the right of purchase from the Government of lands owned by it and sold subsequent to the passage of the act under which such land sales were made. (Woodruff *v.* The Bloomfield Gravel Co., 18 Fed., p. 772.)

Speaking of the admission of California as a State, the judge said:

Thenceforth the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the State, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject to taxation. In all other respects the United States stands upon the same footing as private owners of land.

The United States, in the disposal of its lands, acts as a proprietor and not as a sovereign.

In the case of Pollard's Lessees *v.* Hagan, which I have before cited, the Supreme Court said, speaking then of this provision, but in the State of Alabama, that they would not interfere with the primary disposal of the soil by the Government and would not tax. That has since been put in all the States, I guess, where there was any public land, at least. The court says:

This authorized the passage of all laws necessary to secure the rights of the United States to the public lands and to provide for the sale and to protect them from taxation. (3 Howard, 225, or 15 U. S., 397.)

With the admission of a State the navigable waters of the State and the land under them became the property of the State, and also

the nonnavigable water became subject to the sovereignty of the State and not that of the nation. The General Government can only exercise sovereignty when the Constitution provides it may or it follows logically from provisions of the Constitution.

The Supreme Court, in the case heretofore cited of Pollard *v.* Hagan, declared that—

> The National Government does not hold the public lands by municipal sovereignty it may be supposed to possess or have reserved by compact with the new State for that purpose. (3 Howard, 227, or 15 U. S., 396.)

It may be claimed that the case of Pollard *v.* Hagan is not in point, because Georgia had made a cession of part of its territory for the purpose of creating the State of Alabama, but the United States had claimed the lands of Alabama by virtue of the purchase from France in 1803.

The Supreme Court of the United States, after considering the question of the right of the Government of the United States to the lands in Alabama, says, in the case of Frank *v.* Neilson (2 Peters, 309; 15 U. S., 116):

> So that Alabama was admitted to the Union as an independent State in virtue of the title under the treaty of April, 1803.

The court declared that the Government held the lands just as it held other lands, and there was no exception, and the court declared also, over and over again, that the United States held them in trust for the public. I call attention to the summary in this case. It is a very long case. This is the case of Pollard's Lessee *v.* Hagan et al., decided in 1845 by the Supreme Court of the United States, which will be found in 3 Howard, page 230. The court says, after a considerable discussion and argument:

> By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States, respectively. Second, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

This was the original declaration of the supreme court of Alabama, which the United States court took up and approved:

> Third, the right of the United States to the public lands and the power of Congress to make all needful rules and regulations for the sale and disposition thereof conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the supreme court of the State of Alabama is therefore affirmed.

Mr. President, I have here a good deal of material that I am going to skip. I shall be glad if any Senator would like to look over it any time to furnish him a list of authorities I have not time to read. I have furnished it to some of my acquaintances.

Mr. PILES. I suggest that the Senator put them in the record, anyway.

Mr. TELLER. I will put in enough of them. I can cite, I think, at least forty decisions of the Supreme Court practically to the same effect. The courts have spent a good deal of time determining what was a shore and what were the rights of the abutting landowners, and so forth. I do not care to go into that, because while I believe California still maintains the riparian doctrine, that is, I think, the only western community that does. I do not know about Washington, but I know that Montana and Idaho and some other States do not.

I have tried to select a few of these, so as to show that it was not the same judge making the same decisions, but that different judges were passing upon this question, all coming out at the same place.

Chief Justice Waite, in the case of McCready *v.* Virginia (94 U. S., p. 394), said:

The precise question to be determined in this case is whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.

This is a navigable water.

The principle has long been settled in this court that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. (Pollard's Lessee *v.* Hagan, 3 How., 212; Smith *v.* Maryland, 18 How., 74; Mumford *v.* Wardwell, 6 Wall., 436; Weber *v.* Harbor Commissioners, 18 id., 66.) In like manner, the States own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. (Martin *v.* Waddell, 16 Peters, 410.)

This is taken from the decision:

The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.

Mr. Justice Field, speaking of the condition of California, in the case of Weber *v.* Harbor Commissioners (18 Wallace, p. 65), said:

Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General Government.

Not many members of the Senate were born when this decision I am going to read was made. In the case of Corfield *v.* Coriel, reported in the Fourth Washington Circuit Reports, opinion by Justice Washington, the court says (p. 379):

The grant to Congress to regulate commerce on the navigable waters belonging to the several States renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse, subject only to Congressional regulation. But this grant contains no cession, either express or implied, of territory or of public or private property. The "jus privatum" which a State has in the soil covered by its waters is totally distinct from the "jus publicum" with which it is clothed. The former, such as fisheries of all description, remain common to all the citizens of the State to which it belongs, to be used by them according to their necessities or according to the law which regulates their use.

In the case of Mumford *v.* Wardwell, in 1867 (6 Wallace, 435 and 436), the Supreme Court held, in a case that came from California, as follows:

California was admitted into the Union September 9, 1850, and the act of Congress admitting her declares that she is so admitted on equal footing, in all respects, with the original States.

I think that is found in every act of admission—

The settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States, and that the new States since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders.

When the Revolution took place the people of each State became themselves sovereign—

Mr. President, you want to keep in mind that there was no sovereign that had the power over all these colonies. The court continues—

and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution.

Necessary conclusion is that the ownership of the lot in question—

which was under water—

when the State was admitted into the Union became vested in the State as the absolute owner, subject only to the paramount right of navigation. (6 Wallace, pp. 435–436.)

That is the Alabama case, where they had filled up the river and made the land.

Mr. PERKINS. Mr. President——

The VICE-PRESIDENT. Does the Senator from Colorado yield to the Senator from California?

Mr. TELLER. I do.

Mr. PERKINS. I would state to the Senator from Colorado the fact, which he will remember, that in making appropriations—and I have been associated with him upon committees—that he has always insisted in every case of a proposed improvement bordering on tide lands or overflowed lands, that there should be an easement granted by the State to the General Government.

The Navy Department of the Government especially has declined in numerous instances in California to make an expenditure for a naval station, as has the Treasury Department, for light-house stations and other fortifications in California, until the easement of the State to the overflowed or tide lands is ceded to the General Government.

Mr. TELLER. Mr. President, that is a fact, because we have been of the opinion that the State had control over those waters, of course subject to the right to pass over the navigable waters; but that the land adjoining those waters, which was necessary for the use of the Government in connection with its work, belonged to the States and must be ceded by the States.

As I have said, Mr. President, the court has held in two or three cases—and one of those I shall probably cite if I do not overlook it—that the only authority the Government has got is to regulate the agencies of commerce on the rivers—that they have no title in the water; in other words, the courts say the Government has an easement on the water; and that is all there is of it.

Mr. President, I ask leave to put in some of this matter without reading it, if no one objects.

The VICE-PRESIDENT. Without objection permission is granted.

The matter referred to is as follows:

By the English common law a river is navigable as far as the tide flows, upon the theory that it is a part of the sea.

This doctrine was all right in England, where the rivers are short and where the tides flow even above where they are navigable in fact. But in the United States rivers are

navigable in law as far as they are navigable in fact, and no attention is paid to whether the tide flows or not.

By the English common law the Crown owns the land covered by the water of navigable streams in trust for the public use.

According to the English common law every river is navigable as far as the tide ebbs and flows and it is a royal river and belongs to the King by virtue of his prerogative, but in every other river, even if navigable in fact, there the King's prerogative does not attach, but the right of public use does attach. They are, as the authorities declare, "under the servitude of the public interest," to be used as water highways. They are public rivers, not as to their shores or the land under them, for these are in the riparian proprietors, but only in reference to public use.

At common law land bounded by a river extends to the center of the stream. In Alabama the streams that are navigable in fact the owners of land bound upon it can not assert their right to the soil under the stream.

The right of navigation under both civil and common law is a paramount right. This right is so important that even the sovereign can not obstruct it, nor can the United States.

The King of England can not assert his prerogative to obstruct navigation.

What is the shore?

A piece of land bounded on the shore of the sea or a river.

By the civil law the shore is where the highest tide comes or where the greatest wave extends during the winters.

By the common law the shore is the point where the ordinary tide stops. The shore of a river is at common law the point of ordinary flow.

In Massachusetts the shore is where the sea stands at ordinary times. In the United States admiralty jurisdiction extends to water in fact navigable.

It is a well-established principle of law that nothing passes as incident to an easement but that which is requisite to a fair enjoyment of the right. (5 Mason, 195, 3 Kent Commentaries, 432; Commissioners of the Canal Fund *v.* Kemshall, 26 Wendell, 414.)

Chief Justice Shaw said: "We can not doubt that navigable streams may cease to be such by appropriation of the soil under legislative authority to other purposes." (Commonwealth *v.* Charlestown, 1 Pickens, R. 180.)

The General Government has the right to regulate commerce, and so forth, as provided in paragraph 3 of section 8 of the Constitution, but this does not give Congress any title to the agencies of commerce, rivers and lakes, any more than it does to the railroads of the country.

All that Congress is authorized to do is to regulate commerce, and the control of Congress is limited to the exercise of such powers as are necessary to regulate commerce. The State owns the lands under navigable waters.

The Supreme Court of the United States in the case of the City of Mobile *v.* Eslava (16 Peters, p. 277) says:

The United States then may be said to claim for the public an easement for the transportation of merchandise, etc., in the navigable waters of the original States, while the right of property remains in the States.

The original States possessing this interest in the waters within their jurisdictional limits, the new States can not stand upon an equal footing with them as members of the Union if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers. To recapitulate, we are of opinion: First, that the navigable waters within this State have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same. * * *

In Martin et al. *v.* Waddell the court said:

When the Revolution took place the people of the eastern States became themselves the sovereign, and in that character hold the absolute right to all the navigable waters and the soil under them for their own common use, subject only to the right since surrendered by the Constitution of the United States to the General Government. (16 Peters, 411.)

In the act of Congress providing for the admission of Alabama as a State Congress provided that certain things should be included in the Constitution, as follows:

That the people of Alabama forever disclaims all right and title to the waste or unappropriated lands lying within the State, and that the same shall remain at the sale and disposition of the United States.

Also, that all navigable waters within the State shall forever remain public highways, free to the citizens of that State and the United States, without any tax, duty, impost, or toll thereon imposed by that State.

These provisions were inserted in the constitution of Alabama, which was approved by Congress by a resolution adopted December 14, 1819, in words as follows:

Resolved, That the State of Alabama shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatsoever.

Mr. TELLER. Speaking of the compact which was made that Alabama should not tax the land, and so forth, the court continues:

This supposed compact is therefore nothing more than a regulation of commerce to that extent among the several States and can have no controlling influence in the decision of the case before us. *This right of eminent domain over the shores and the soils under the navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it.* To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty and deprive the States of the power to exercise a numerous and important class of police powers. (See p. 230.)

And the court concludes as follows:

By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States, respectively. Second, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.

The Supreme Court of the United States said in 1842, in the case of Martin *v.* Waddell (16 Peters, p. 411; 14 U. S. Repts., p. 349):

When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their common use, subject only to the rights since surrendered by their constitutions to the General Government.

If the States took the absolute title to the navigable waters, they certainly did to the nonnavigable waters.

Congress can not interfere with waters of a State, except it may be necessary to protect the navigability of a navigable stream, and the courts have held that that provision of the Constitution did not give the Government any title to or control over the waters of the rivers in the States.

I do not care to enter into any discussion here, but I think that will be admitted. If the Government did not have any title to waters upon which it runs its ships, it certainly did not over trout streams that run into and make up the river.

The Supreme Court of the United States, in 16 Peters, said:

The United States may be said to claim for the public an easement for the transportation of merchandise, and so forth, in the navigable waters of the original States,

while the right of property remains in the States. (See Mobile v. Eslava, 16 Peters, 253; 14 U. S. Rept., p. 277.)

The court in the last-cited case says:

The orignal States possessing this interest in the waters within their jurisdictional limit, the new States can not stand upon an equal footing with them as members of the Union if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers.

Mr. PILES. Will the Senator permit me to call his attention to one fact?

The VICE-PRESIDENT. Does the Senator from Colorado yield to the Senator from Washington?

Mr. TELLER. I do.

Mr. PILES. In that connection I should just like to call the attention of the Senator from Colorado to the fact that the State of Washington, at the time it adopted its constitution, did not take any chance on its ownership in the beds, shores, and so forth, of the navigable streams of that State.

Mr. TELLER. I shall be glad to have the Senator read the provision.

Mr. PILES. The provision of the constitution of the State of Washington is as follows:

SECTION 1. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the tide of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.

That is along the idea which the Senator from Colorado has been discussing.

Mr. TELLER. The court also stated in the case I have just cited—that of the city of Mobile *v.* Eslava:

That such rivers (navigable rivers) are common for navigation and commerce in the widest sense is free from doubt—that Alabama has jurisdiction and power over them the same as the original States have over their navigable waters is equally clear. (Mobile *v.* Eslava, U. S. Rept., 14, p. 279.)

In the same case, on page 259, the court said:

That each and all of the States have sovereign power over their navigable waters above and below the tide no one doubts. (282 U. S., 14.)

The State may bridge and dam navigable streams if Congress has not declared them navigable waters. This the State is not likely to do if such bridge or dam destroys the navigability of the streams. (See Wilson *v.* Blackbird Creek, 2 Peters, p. 245; Gilman *v.* Philadelphia, 3 Wall., p. 713, and Pound *v.* Turck, 95 U. S., p. 459.)

The courts have held that the exercise of such power by the State is not inconsistent with the object for which the Federal Government was established.

Mr. President, it may be inquired how the original States got these rights. Some of them got them by virtue of their charters. Some of them assumed such rights simply as sovereign States, and you can not trace them back—at least I have not been able to do so—to any authority in some of the colonies that became States. Some of the old colonies asserted that right because there seemed to be a notion that it belonged to the sovereign in England; that it belonged to the King. Take Connecticut. It did not have a charter at all. If it did, I do not remember what it was.

Mr. BACON. Oh, yes.

Mr. TELLER. I think Connecticut had a charter that was taken away.

Mr. BACON. The Senator will recall the story of the Charter Oak.

Mr. TELLER. Mr. President, Rhode Island did not have a charter. Rhode Island was settled by a lot of tramps, who went there carrying with them their notions of free government and all that. When the trouble came, Rhode Island, although small in extent, was just as big in law as any of the other States.

In the case of Mobile *v.* Eslava (16 Peters, p. 253) the Supreme Court says:

> That the original States by their colonial charter had the right of *property in bays and arms of the sea.* This they *retained,* and it can *only be interfered with* by the Federal Government under their right to regulate commerce so far as to furnish a free navigation. The United States, then, may claim for the public an easement for transportation of merchandise, etc., in the navigable waters of the original States, while the right of property remains in the States.

The court also says in the Mobile case:

> That each and all the States have sovereign power over the navigable waters above and below the tide, no one doubts. (See p. 259.)

If sovereign over navigable waters, is there any reason to say the States are not sovereign over the nonnavigable waters? How did the States retain their right? They retained it by withholding it from the General Government.

Mr. SUTHERLAND. Mr. President——

The VICE-PRESIDENT. Does the Senator from Colorado yield to the Senator from Utah?

Mr. TELLER. I do.

Mr. SUTHERLAND. I do not want to interrupt the course of the Senator's argument.

Mr. TELLER. You will not interrupt me at all; it will not interfere with me.

Mr. SUTHERLAND. If the Senator's argument that far is sound—and, personally, I want to say to the Senator that I am in entire sympathy with him—I want to ask whether it does not inevitably lead to the final conclusion that the only authority which the General Government has in the matter of granting the right to build dams, bridges, and so on, across navigable rivers is simply to see that the right of navigation is protected, and that the General Government has absolutely no authority or power whatever to charge a fee to any person or corporation either for the use of the water for irrigation or for the generation of power or for any other purpose?

Mr. TELLER. Certainly. The Government can not control the water of the Mississippi River, for instance.

Mr. SUTHERLAND. I want to ask the Senator further, if that is so with reference to navigable streams, whether or not his argument will not apply all the stronger to the case of nonnavigable waters, such as exist in the irrigation States?

Mr. TELLER. Undoubtedly. There is not a provision in the Constitution anywhere that would indicate that anybody supposed the General Government would have anything to do with such waters or their shores or the land under them. All the Government can do is to regulate the commerce on the streams. The Constitution does not say "commerce on the streams," but at that time there was no commerce at all except what was on the water, the rivers, lakes, etc.

be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands.

The court also said:

Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government and not according to those of the government ceding it. (Vat. Law of Nations, b. 1, c. 19, secs. 210, 214, 245, and b. 2, c. 7, sec. 80.)

The Supreme Court, in the Pollard case, said:

Then to Alabama belong the navigable waters and soils under them in controversy in this case, subject to the rights surrendered by the Constitution to the United States, and no compact that might be made between her and the United States could diminish or enlarge these rights. (Pollard's Lessee *v.* Hagan, 3 Howard, p. 229, 15 U. S., 402.)

In the case of the city of Mobile *v.* Eslava, reported in 1842 (16 Peters, p. 254), the court says, in speaking of the reservations of public lands which are found in all new States:

The clause inserted into the constitution of Alabama reserving the rights of property to the United States, as a compact with them, embraces lands under water as emphatically as those not covered with water. But if no stipulation, saving the interest of the United States, had been made, they would have had just as much right to their private property as an individual had to his. They hold, as a corporation, an individual title. * * * The United States, as owner, can do no act to obstruct the free public use of the waters more than a private owner of the soil under water could obstruct the navigation.

But in 1845 the court, in the case of Pollard's Lessee *v.* Hagan, determined that the fee of land under the navigable waters was the property of the State, and this has been the decision of the court in repeated cases ever since. (See Pollard's Lessee *v.* Hagan, 3 Howard.)

It is needless to say if *no* right of property exists in the United States in navigable rivers there is none in the nonnavigable waters. (See 3 Howard, Ohio Repts., Gov't *v.* Chambers, 498.)

The water of navigable rivers can not be obstructed by the State or individuals if Congress declares that it is a navigable river, not because the United States owns the river, but because as an agency of commerce Congress can prevent its obstruction to navigation in the protection of interstate commerce.

In one case the court has said, "That the navigable rivers are the public property of the nation" (Gilman *v.* Philadelphia, 3 Wall., 725), but in many other cases it has been held that the United States has no property in the river and *only an easement* on the right, and the States own the river, subject to the right of commerce, which the Government of the United States must regulate and protect, and the State can not interfere with such regulation.

Again the court quotes from the case of Pollard's Lessee *v.* Hagan (3 Howard, p. 230):

The right of eminent domain over the shores and soil under the navigable waters, for all municipal purposes, belongs exclusively to the States, within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it.

It is evident the court did not in the Gilman case intend to assert a property right to their rivers in the usual sense in which we speak of property right. A mere easement is a property right, and the court in the Gilman case holds that pilot laws are a regulation of commerce, but if enacted in the interest of commerce they are not in conflict with the power of Congress to regulate commerce. (See 727.)

But if Congress has passed no law with reference to commerce on a river the State may authorize a dam across a navigable stream. (See Wilson *v.* Black Bird Creek Marsh, 2 Peters, 250.)

In the case of Pennsylvania *v.* Whitney and Belmont Bridge Co. (18 Howard, p. 432), the court says:

> The purely internal streams of a State which are navigable belong to the riparian owners to the thread of the stream and, as such, they have the right to use the waters and bed beneath for their private emolument, subject only to the public right of navigation, and may construct wharves or dams or canals, etc., subject to this public easement. In respect to these purely internal streams of a State, the right of public navigation is exclusively under the control and regulation of the State legislature, and a structure, although it may be a real obstruction to navigation, if authorized by the legislature, it is lawful.

Chief Justice Taney, in delivering the opinion in the case of John Den *v.* Jersey Company, to be found in 15 Howard, 432, said:

> It is not necessary to state particularly the charters and grounds under which they claim—

This was in New Jersey—

> It is not necessary to state particularly the charters and grants under which they claim. They are all set out in the special verdict in the case of Martin *v.* Waddell, reported in 16 Peters, 367. The title claimed on behalf of the proprietors in that case was the same with the title upon which the plaintiff now relies. And upon very full argument and consideration in the case referred to, the court were of opinion that the soil under the public navigable waters of east New Jersey belonged to the State and not to the proprietors; and upon that ground gave judgment for the defendant. The decision in that case must govern this.
>
> The counsel for the plaintiff, however, endeavor to distinguish the case before us from the former one, upon the ground that nothing but the right of fishery was decided in Martin *v.* Waddell, and not the right to the soil. But they would seem to have overlooked the circumstance that it was an action of ejectment for the land covered with water. It was not an action for disturbing the plaintiff in a right of fishery, but an action to recover possession of the soil itself. And in giving judgment for the defendant the court necessarily decided upon the title to the soil.

Mr. President, I want to spend a few moments, and only a few moments, on the question of forest reserves. I am not going into that question except as to the matter of title. I am not going to enter into a discussion whether the forest reserves are beneficial to the country or injurious, but I want to call attention to some decisions of the courts. In the case of United States *v.* Cornell (Mason's Cir. Ct. Repts. vol. 12, p. 63), it was held:

> But although the United States may well purchase and hold lands for public purposes, within the territorial limits of a State, this does not of itself oust the jurisdiction or sovereignty of such State over the lands so purchased. It remains until the State has relinquished its authority over the land either expressly or by necessary implication.

Another important case in this connection is the case of the Fort Leavenworth Railroad Company *v.* Lowe (114 U. S., p. 525). I will make a brief statement in regard to that case.

Before there was an organized government in what is now the State of Kansas the Government of the United States took possession of a piece of ground for military purposes, now known as Fort Leavenworth, occupied it, and has occupied it ever since. I suppose the Government took possession of it seventy or seventy-five years ago. At all events, when the State of Kansas was admitted to the Union there was no reference made to Fort Leavenworth. The Government did not reserve anything. Kansas did not promise anything. Afterwards it was asserted that that property, being for the use of the

Government of the United States, fell within the provision of the law that a State can not tax Government property. The question did not arise with reference to the fort and buildings, but arose with reference to the land of the railroad that crossed over the reservation, and the railroad company asserted the right to be independent of taxes. The matter came into the court. The court decided that Kansas had absolute jurisdiction of it. Mind you, this was a piece of land which the Government had appropriated years and years before Kansas was settled, and then Kansas was admitted without reference being made to the military reservation. The Supreme Court of the United States held that Kansas had jurisdiction; but subsequently Kansas was prevailed upon by the Government to cede its jurisdiction over that reservation. Until that time Kansas had absolute jurisdiction.

I do not propose to occupy the Senate much longer, although I have a great deal of manuscript here to which I intended to call attention. I do want to call attention, however, to one thing that I think is pertinent to be considered, particularly in connection with the pending case. I complained yesterday that I did not think the Government of the United States should allow any individual to control navigable waters; that I thought the United States was rich enough and strong enough when rivers were not navigable and it wanted to make them navigable to do so itself. I think in 1846 the Territory of Wisconsin was anxious to have the Fox River utilized for commerce. You will remember that was before railroads were common. It came to Congress, and Congress granted to the Territory, the title to be in the State when it became a State, a certain amount of land to build locks and dams that were necessary on Fox River. The State government, when it came into existence, promptly accepted the act:

> The State accepted said grant of land for said purposes, and by an act of its legislature, approved August 8, 1848—

That was immediately after their admission—

> undertook the improvement of said rivers, and enacted, among other things, that "Whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the State, subject to the future action of the legislature."

They went on with that, and not finding themselves able to carry out the work, they finally incorporated a company called the Fox and Wisconsin Improvement Company. They went on and spent some money on it, and finally failed, just as other concerns have failed in doing these things, and then the Government found itself in a bad situation. The company could not go on, and they went into bankruptcy. Subsequently the Government bought them out, paid them off, and got rid of them. I believe we have had one other case of the same kind, where parties have gone out and got the permission from the Government, and they have not been able to comply, and the Government has had to buy them out. But I want to read a little thing here. This matter came to the Supreme Court of the United States in 1898. There was a question whether the canal company had any rights there or not, and the court said:

> Upon the undisputed facts contained in the record we think it clear that the canal company is possessed of whatever rights to the use of this incidental water power that could be validly granted by the United States.

Now, it had a State concession and it had some kind of a concession from the General Government through the State. The litigation arose from the fact that one of the riparian owners claimed the right to some part of this water and undertook to interfere. This is another case, and it is cited by Judge Shiras:

> The value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors, who had not the means to make it available. Those proprietors lost nothing that was useful to them except the technical right to have the water flow as it had been accustomed and the possibility of their being able sometime to improve it. If the State could condemn this use of the water, with the other property of the riparion owner, it might raise a revenue from it sufficient to complete the work, which might otherwise fail. There was every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed, it seems to have been the practice, not only in New York, but in Ohio, in Wisconsin, and perhaps in other States, in authorizing the erection of dams for the purpose of navigation, or, rather, public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the State.

I read that because I want to show that has been the rule, and there are several cases that I could cite from the State of New York as to the rights of the States. The States always control the water, or claim to control it, at least. I do not know that there has ever been a controversy between a State and the General Government as to who owned the water.

After stating this, the court says:

> The learned judge then proceeds to cite decisions to that effect rendered in several of the State supreme courts.

I want to say here now that in a careful examination of the authorities, running over months, I have never found a case where the Government of the United States has asserted its right to waters that I assert belong to the State. Some of the executive officers and some of its subordinates may have been confident that the Government of the United States could control the water absolutely, but no Federal or State court has so held.

I have one other matter I wish to call attention to of about the same general character. Mr. President, I have asserted, and I want to assert it now, that the United States has not any right to go into business. The United States can not legally go into a mercantile business, in my judgment. It can, of course, by its officials, if it sets up a store and puts somebody in it, do it until the question is raised in some proper manner. It can not go into the lumber business, but it is in the lumber business now.

It has in Colorado a large number of sawmills located on forest reserves. It is cutting timber for public use and selling it at very much higher prices than we were in the habit of paying, and where we have had one sawmill cutting timber we have in one single forest reserve six sawmills; and yet they tell us that the very purpose of and object of the reserve is to protect the timber. They have traversed the mining region of my State and the building region and solicited parties to buy lumber of them. There is not a miner in some sections of the State who does not pay tribute to them. A hundred and some-odd thousand dollars was paid in Colorado last year. A miner can not go out in the forest and cut a stick to put in his mine but he must get the permission of some man or pay for it.

Mr. President, I am one of those who believe in the protection of forests, but I believe in their protection in a proper way, and I know

there has been practically no waste of timber in the country in which I live. I was brought up in a timber country. I remember when more than half of western New York was covered with timber. I can remember when all of southern Pennsylvania was covered with timber—the finest timber in the world. There is not any left. I heard a Senator say one day we have wasted our timber; but I want to dissent from that. In the section of New York in which I lived until I was old enough to go West, I saw the timber destroyed. I saw the farmer cut down the timber and roll it in a heap and burn it. Why did he do that? In order to make a place for a home. He wanted a place to build a house and make a farm. He could not do it in the woods, and he cut down the timber and burned it up; and I have seen fine timber burned up. It was followed by a flourishing farming community.

Mr. President, I am one of those who believe that civilization, a country settled by intelligent people, is a great deal better than a forest, however beautiful it may be, or however profitable it would have been if left. But seventy years ago and more, eighty years ago, the people cut up these trees and turned them into ashes that they might make a better condition, and they did make it. Would the State of New York have been better if that whole country had been kept in timber until to-day? It is possible that the owners of the land if they could have lived until this time would have made some money. by selling the timber, but the community would not have been so well off.

I would rather see people living on land than to see timber on it, no matter how beautiful it is or how fine. We have destroyed some timber in Colorado, but we have added to the sum of human happiness by so doing. We have put into the commerce of the world a billion dollars of gold and silver, and we have made homes for thousands and thousands of men, and we have built up a civilization that can not be beaten in any part of the world. Suppose we have not so much timber; suppose there is a bare hill here and there. Mr. President, we have something better than timber to show for it. We have schools and colleges, and churches and hospitals, and all the appliances of civilization; and I can show you on that land where the timber has of course become scarcer, well-educated men and women and when I say educated I mean those who have college diplomas—I can show you more men and women with that kind of an education than you can find in any New England city of the same size. I can show it not in one city alone, but in a dozen. I can show you that some good has come out of the destruction of the forests.

The superintendent of a street car line in Denver said to me one day, "I have 200 college graduates running on my street car line." You can not find that anywhere else in the world. Why do we have them? Because we have made a settlement there that is desirable for the people, and we have a climate which is health giving, which makes it desirable for those who have fallen into ill health to come there and live.

We have economized and utilized our advantages, such advantages as we have had. We have had some trouble. I went there when the Indian was rife. I went there when every pound of freight that was brought in paid 25 cents a pound. Whether it was machinery for our mills or woolen goods that the women wore, it cost at least 25

cents a pound to land it in Denver. Why should we not use the timber?

I heard a prosecution once there for cutting timber on the public lands. The judge, sitting at his desk, said: "I mean to dismiss this case. The desk at which I am sitting, the church next door have been built out of timber cut on the public land. Congress said to us: 'This is a country open for settlement,' and we came here. Have we not a right to make ourselves comfortable? Can we carry on civilization here unless we have the opportunity to do that?" To-day they will tell you we have blasted the hills because we have cut off the pine. If we have cut off the pine, we have made a hundred orchards where we have made a bare hill.

Mr. President, this question to us is a live one. Are the State of Colorado and the State of Idaho and other States to be refused the opportunity of filling up with settlers? One-fifth of the State of Colorado is in a forest reserve; more than that in the State of Idaho. We passed a law that would open up every acre of that to the prospector. The Department has put on such rules and regulations that a prospector dare not go into a forest reserve. We passed a law that a homesteader could go into a reserve if he saw fit. They have passed such regulations that no homesteader can go in. If he does at the bidding of some cheap Jack, he will be told, "You can not make a living here. Get out." In my State I can show not simply a notice to quit, but cite cases where they have absolutely moved him off the homestead, which he could hold according to law.

Mr. FLINT. May I interrupt the Senator from Colorado?

Mr. TELLER. You may.

Mr. FLINT. I want to ask the Senator what is his authority for making the statement that a homesteader can go into a forest reserve?

Mr. TELLER. We have a law.

Mr. FLINT. What law?

Mr. TELLER. A statute.

Mr. FLINT. I do not understand——

Mr. TELLER. Yes; there is a statute.

Mr. FLINT. I do not understand that a homesteader can go into a forest reserve.

Mr. TELLER. He can under the statute, but it is absolutely ignored by the Department.

Mr. FLINT. The only statute which permits a person to enter a forest reserve——

Mr. TELLER. If the Senator from California does not know he can find out by looking at the statute. There is a law of the United States which allows a man to go into a forest reserve and make a homestead.

Mr. FLINT. Without the land being set apart as agricultural land by the Forester?

Mr. TELLER. There is nothing said about that.

Mr. FLINT. I should like to have the Senator refer to the statute.

Mr. TELLER. It was intended by Congress that a man should determine for himself whether he could make a living on the land. He should not have to ask a subordinate of the Government. Now, under the regulations, he must first get consent before he can get in, and then if the officials do not think it is all right they can put him out.

Mr. FLINT. I am trying to get the Senator to refer me to the statute. The only statute——

Mr. TELLER. I do not think there is such a law.

Mr. FLINT. I think I had something to do with drawing the law.

Mr. TELLER. Then you ought to know what it is.

Mr. FLINT. As I understand the law, no land within a forest reserve is subject to homestead entry unless after an investigation by the Secretary of Agriculture he determines that the land is more valuable for agriculture than it is for forestry.

Mr. TELLER. That was not in the original law.

Mr. CLARK, of Wyoming. Mr. President——

The VICE-PRESIDENT. Does the Senator from Colorado yield to the Senator from Wyoming?

Mr. TELLER. Certainly.

Mr. CLARK, of Wyoming. I wish to ask the Senator from Colorado whether it is not a fact that, notwithstanding the statute which he has mentioned, as well as the statute mentioned by the Senator from California [Mr. Flint, each one of these proclamations for a forest reserve ends with warning all people not to make settlement within the reserve?

Mr. TELLER. In all the forest reserves you will find a card saying "Keep out of here; this is Government property." And that was so soon after the law passed it was ignored by the Department at once.

I want to say another thing about which we in the West complain. I did not intend to touch upon it at all, but I will. In 1873, for the first time, Congress provided for the appropriation of coal lands. Up to that time there never had been any difference between coal land and agricultural land, so far as the Government was concerned. In 1873 Congress provided that all land that was coal land should be selected and certified by the public officials as coal land, and then that nobody could take any of that land without paying not less than $10 an acre if it was within a certain distance of a railroad and not less than $20 an acre if it was nearer. We supposed that that meant $10 an acre. We knew that way back, years ago, there was a statute which provided that the public lands should be sold for not less than $1.25 an acre, and they had always been sold for $1.25, except as sometimes changed, for instance, when land grants were made, and so forth.

The Executive Department within the last two years has determined that that gave them the power to determine that they could ask just as much more for the coal lands as they wanted, and they have raised the price in my State from $10 an acre, in that district where under the law it should be $10 to $25, and where it should be $20 they have raised it to $50. Does anybody suppose that Congress ever intended to pass a law disposing of the public lands and leaving it to the Executive Department to say the lands should not be sold for less than $50 an acre? Why could they not just as well say a hundred dollars?

What we complain of in the West more than anything else, in connection with forest reserves, are these unfair things that are being done—bad administration of the law. We know, whether the Department does or not, that we are entitled to have the settlers come there and make a home, and we know that they are retarding

the settlement and hindering the growth of these great Western States without advantage to anyone.

Mr. President, before I forget it I wish to call attention to a suggestion I nearly forgot. This is leaving the matter that we are speaking of.

When we were providing for the settlement of the great Northwest Territory in 1787 and 1788 and so on we made some provisions, and this is one which will be found in the First Statutes at Large, page 468:

And be it further enacted, That all navigable rivers within the territory to be disposed of by virtue of this act—

That meant all the five States—Ohio, Indiana, Illinois, Minnesota, and Wisconsin—

SEC. 9. *And be it further enacted*, That all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways, and that in all cases where the opposite banks of any stream not navigable shall belong to different persons the stream and the bed thereof shall become common to both.

Then again, later, they reiterated that, particularly as to Indiana, as to which the statement was made:

And be it further enacted, That all navigable rivers, creeks, and waters within the Indiana Territory shall be deemed to be and remain public highways.

I want to call attention to that. It has been the policy of this Government to keep the streams open wherever they were navigable and not attempt to control them where they were nonnavigable.

I have detained the Senate too long, and I have not said all I intended to say. I shall take up this matter again some day and add some things that I would have said to-day if time would permit, even at the risk of imposing on the patience of the Senate.

Thursday, April 2, 1908.

Mr. TELLER. On Tuesday I made some remarks in the Senate, and I referred to and quoted from an address delivered by Mr. Justice Harlan, of the State of Kentucky, in the city of New York, a few weeks since. I ask that in submitting my remarks for printing I may be allowed to couple with it in the Record the speech of Mr. Justice Harlan. It is an admirable speech, historical in the beginning and legal and judicial in its termination. It is a speech I think everyone would like to read, and it ought to be preserved.

The VICE-PRESIDENT. The Senator from Colorado asks permission to incorporate as a part of his remarks in the Record the speech of Mr. Justice Harlan, to which reference is made by him. Is there objection? The Chair hears none, and it is so ordered.

The address referred to is as follows:

[Remarks of Mr. Justice Harlan at the banquet given in his honor by "The Kentuckians," in New York, on December 23, 1907, at the Hotel New Plaza.]

TOAST: "KENTUCKY: UNITED, WE STAND; DIVIDED, WE FALL."[1]

Mr. President, fellow-Kentuckians, and guests, I count myself most happy to be surrounded on the present occasion by so many representative men of my native State. Every true man has a peculiar affection for the State in which he first saw the light of day and for the people among whom he passed his early life. But it has seemed to me—indeed, the fact has been often commented upon by others—that there is an unusual feelingof brotherhood among Kentuckians. I am far enough advanced in years, fellow-Kentuckians, to have known personally even the grandfathers of many members

of this club. At a memorable period in the country's history I stood with the fathers of some of you under the flag of the Union, while the fathers of others of your number rallied under another flag—each man, whether under the one flag or the other, resolutely contending for what in his conscience he deemed to be right. But I rejoice to say that we who then were opposed are no longer estranged, but with hands clasped in friendship stand together under the same flag, now recognized throughout the world as the emblem of the great Republic. We may differ about political questions, but, apart from such differences, when Kentuckians meet, whether in their own country or in foreign lands, they warm toward each other because they are fellow-Kentuckians.

We are, however, something far more than Kentuckians. We are Americans. Trite as that phrase may sound, the older I grow the more priceless to me is the fact it expresses. We may well be proud of the State that gave birth to Abraham Lincoln, that sent Henry Clay and John J. Crittenden to the Senate, and nurtured such men as Zachary Taylor, Isaac Shelby, George Nicholas, the Breckenridges, the Marshalls, John Boyle, George Robertson, Samuel F. Miller, Joseph R. Underwood, Charles S. Morehead, James Guthrie, John L. Helm, Madison C. Johnson, Lazarus W. Powell, Archibald Dixon, Joshua F. Bell, Richard H. Menefee, and many others distinguished in every walk of life and too numerous to be mentioned on this occasion. But what would it mean to us to be Kentuckians if we were not also, or rather first of all, Americans, whose allegiance to the nation in matters of general concern is above allegiance to any State, just as the Constitution of the United States, with respect to all national objects, is above the constitution of any State.

The toast assigned to me suggests, Mr. President, many interesting thoughts about the early days of our Commonwealth and its relations to the National Government. Going back for a moment to the beginnings of Kentucky's history, we recall the interesting fact that very shortly after the close of the war for independence and after the acceptance of the Constitution by the requisite number of States a scheme was devised by foreign conspirators and domestic malcontents to detach the people of Kentucky from all connection with the original States, and thus make the Alleghenies the southwestern limit of the United States. This scheme found no favor with the indomitable pioneers who, surrounded by hostile Indian tribes in the wilds of an unsettled country, established a government with a constitution modeled after the Federal Constitution and more than a century ago applied to Congress for the admission of Kentucky into the Union as a State. Thus our fathers, resisting all appeals made to them to establish an independent State in the West, placed themselves by the side of their brethren of the older States, and caused to be inscribed upon Kentucky's coat of arms the suggestive and memorable words, "United, we stand; divided, we fall." There comes to my mind, Mr. President, a personal letter of the great Chief Justice, in which his use of that motto was so striking that it is peculiarly appropriate upon this occasion to quote his words. He said: "I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time * * * when the maxim, 'United, we stand; divided, we fall,' was the maxim of every orthodox American, and I had imbibed these sentiments so thoroughly that they constituted a part of my being, I carried them with me into the army, where I found myself associated with brave men from different States who were risking life and everything valuable in a common cause believed by all to be most precious, * * * and where I was confirmed in the habit of considering America as my country and Congress as my government." The habit of considering America as his country was the keynote of the life and work of the incomparable jurist whose profound and lucid judgments on behalf of the court of which he was the head built the broad highway upon which the nation has advanced to its present position of power and strength and unity.

There are some, Mr. President, who think they see dark clouds upon the horizon of our future, and express grave apprehension as to the stability of the Government ordained by the people of the United States and established by the Constitution. In a population of 90,000,000 of people we must expect to find some who indulge in gloomy forebodings as to the future of the country, and who seem to cultivate the habit of predicting disaster. Such persons are quite unhappy when the facts do not justify them in believing that everything is going wrong. But there is no occasion for alarm. The American people, knowing that eternal vigilance is the price of liberty, will take care that no harm comes to the country. At all times since the organization of the Government they have shown themselves equal to every emergency, however sudden or startling, which involved the safety of our institutions. They may seem at times to tolerate false, visionary, and mischievous views, but in the end they will surely recognize the dangers of the stiuation, whatever they may be, and will do what prudence and patriotism require at their hands. Their final, deliberate judgment upon public questions is quite certain to be the best for all concerned.

What, let me ask, are some of the grounds upon which the pessimist of these days bases his fears for the safety of our institutions? He persuades himself to believe that the trend in public affairs is toward the centralization of all governmental power in the nation and the destruction of the rights of the States. If this were really the case, the duty of every American would be to resist such a tendency by every means in his power. A National Government for national affairs and State governments for State affairs is the foundation rock upon which our institutions rest. Any serious departure from that principle would bring disaster upon the American system of free government.

But the fact is not as the pessimist alleges it to be. The American people are more determined than at any time in their history to maintain both national and States rights, as those rights exist under the Union ordained by the Constitution. I say the people of the United States, for although the Constitution was accepted by the separate action of the people in their respective States, they moved together, in a collective capacity, as one people, in creating a nation for certain specified objects of general concern. They will not patiently consider any suggestion or scheme that involves a Union upon any other basis. They will maintain, at whatever cost and in all their integrity, both national and States rights.

The best friends of States rights, permit me to say, are not those who habitually denounce as illegal everything done by the General Government, but those who recognize the Government of the Union as possessing all the powers granted to it in the Constitution, either expressly or by necessary implication; for, without a General Government possessing controlling power in relation to matters of national concern, the States would have no prestige before the world and would be in perpetual conflict with one another. With equal truth it may be said that the best friends of the Union are those who hold that the States possess all governmental powers not granted to the General Government and that are not inconsistent with their own constitutions or with the Constitution of the United States, or with a republican form of government. The people of the United States cherish, and will compel adherence to, the fundamental doctrine that the States are vital parts of the American system of government; and they will insist with no less determination upon the recognition of the just powers of the States—to be exerted always in subordination to the supreme law of the land—as essential to the preservation of our liberties. The Supreme Court of the United States has again and again declared, upon full consideration, that a close and firm Union is necessary for the happiness of the American people, and that "without the States in union there could be no such political body as the United States."

If, then, the matchless Government devised by the fathers and ordained by the people of the United States is to be preserved and handed down intact to posterity, national power and State power must go hand in hand in harmony with the Constitution. If those powers clash, the paramount authority of the Union within its prescribed sphere of action must prevail. Such is the express mandate of the Constitution, and such our common sense and experience tell us must always be the case, if liberty, regulated by law, is not to perish from our land. The nation being supreme within the sphere of its action as defined by the Constitution, its authority, when legally exerted, binds every State as well as all individuals within the territory of the United States. The glory of the Republic is that its affairs are regulated by a written Constitution—the fundamental law which distributes the powers of government among the three separate, coequal, and coordinate departments, each exerting the authority, and only the authority, conferred upon it—and which Constitution, until amended in the mode prescribed by itself, must be deemed supreme over the Congress, over the President, over the courts, over the States, and over the people themselves.

The pessimist is misled by the declaration of some, happily few in number, who hold that, whatever the words of the Constitution, that instrument should be so construed as to make it mean what a majority of the people think, at a given time, it should mean. He is also misled by the theory advanced by those who hold that Congress must be permitted to exert any governmental power whatsoever, not expressly denied to it, if that body deems that its exercise will promote "the general welfare." But such theories of constitutional construction find no support in judicial decisions or in sound reason, least of all in the final judgments of that tribunal whose greatest function it is to declare the meaning and scope of the fundamental law. The National Government, it should ever be remembered, is one of limited, delegated powers, and is not a pure democracy, in which the will of a popular majority as expressed at the polls at a particular time becomes immediately the supreme law. It is a representative Republic, in which the will of the people is to be ascertained in a prescribed mode, and carried into effect only by appointed agents designated by the people themselves, in the manner indicated by law. It would be a calamity unspeakable if our institutions and the sacred rights of life, liberty, and property should be put at the mercy of a majority unrestrained by a written supreme law binding every department of government, even the people themselves. The pessimist—indeed all—may take courage in the fact that

it has become a recognized rule of construction that the Constitution is to be taken as meaning what its words in their natural, obvious sense import, and, if the people desire it to mean something different, that instrument must be amended in the manner, and only in the manner, prescribed by itself. The dispute among statesmen has not been so much in reference to the general principles that should govern constitutional construction as to the application of those principles in determining the extent of the powers granted to the National Government. Early in the history of the nation some insisted upon a narrow, literal interpretation of the Constitution which, had it been approved, would have made the General Government a rope of sand, wholly inadequate to the great purposes for which it was established. But long ago that view was rejected by the Supreme Court of the United States, and its rejection has been universally approved.

There are some who would deny to Congress all powers that are not, in words, specified in the Constitution as belonging to the legislative branch of the Government. They would eliminate altogether from our jurisprudence the long-established doctrine that Congress may exercise powers that are plainly incidental to those expressly granted and not prohibited by the Constitution—that is, powers necessarily implied because embraced by those enumerated, and without which the Government would be unequal to the objects for which it was avowedly established and would become, to use the words of Marshall, "a splendid bauble." If the views of the latter class of constitutional critics should gain the approval of the American people, the country would be carried back to that period of its history when distinguished politicians gravely argued that the Supreme Court of the United States could not, without violating the Constitution, review the action of a State court which, by its final judgment, denied or destroyed rights plainly secured to the citizen by the supreme law of the land. Such critics are politically of kin to those who affirm that the courts may not declare a legislative enactment void, even when it is in plain violation of the Constitution.

It is true that national power, as now exerted, covers a wider field of action than it did in the early days of the Republic, but that does not prove as the pessimist would have us think, that the Government has usurped powers that do not belong to it and has entered the domain reserved by and for the States. It proves only that the nation has from time to time as the public interests demanded, brought into active operation powers which Congress had not previously chosen to exert. So vast has been the increase in our population and so diversified and extended have become our industrial interests that occasions must necessarily arise from time to time for a more intimate connection between the Government of the Union and the commercial and other affairs of the people than perhaps the fathers ever dreamed of. Hence if modern problems, as connected with the operations of government, are to be solved in the interest and for the benefit of the people and if the nation is to keep abreast with advancing civilization, new fields of legislation must be occupied. While new legislation must always be closely scrutinized and care be taken that it is not inconsistent with the Constitution, we must not be so unwise or suspicious or timid as to reject a new policy or a new law simply because it is new or simply because it may cover areas not consciously within the mental vision or the thoughts of the framers of the Constitution. That wonderful instrument, the Supreme Court has said, was intended "to be adapted to the various crises of human affairs."

The wise men of the constitutional period deemed it unnecessary to go further than to specify the general objects to be accomplished by the National Government and to enumerate the powers that may be exerted by it leaving to Congress—under its responsibility to the people and under its authority to pass such laws as were necessary and proper to carry into effect the powers enumerated and granted—to employ such means not expressly or impliedly prohibited as are appropriate to the particular object designed to be accomplished. The supreme judicial tribunal of the nation has spoken with distinctness upon this point. Its words in a great case—all its members concurring—are: "The Constitution unavoidably dealt in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects and to mold and model the exercise of its powers as its own wisdom and the public

interests should require." Thus, Mr. President, was the nation armed with authority to meet new conditions that might arise and which permitted or required governmental action. Is a proposed new law embraced by any general power granted? Has it any reasonable connection with the specified objects, or any of them, to which, under the Constitution, the power of the nation extends? If these questions be answered in the affirmative, then it will only remain for the lawmaking department of the Government to determine whether the proposed law will be conducive to the public welfare. And that determination will not be one of law, but simply one of policy. Granted the power to legislate in reference to a particular matter, Congress can employ any means, not forbidden nor inconsistent with the Constitution, that may be germane to the end proposed to be accomplished.

Therefore let the country gather up all the strength that comes from the patriotism and loyalty of the American people and go forward in its marvelous career, holding to the confident belief, justified by the words of the Constitution and by judicial decisions, that the checks in our governmental system will suffice in the future, as they have sufficed in the past, to guard our institutions against insidious attacks upon the fundamental principles of free government or against the exercise of arbitrary or usurped power. Keeping within the scope and broad lines of the Constitution, we may walk safely and without fear. We need not hesitate to build on the foundations laid by the forefathers. Those foundations are broad and deep, and so long as new measures and policies are tested by the plumb line of the Constitution and we keep well within its wise limitations we may safely rear whatever superstructure our welfare and greatness as a nation may require.

Let us, then, move on in the "old paths, where is the good way" marked out by the fathers. Let us not give our approval to any interpretation of the Constitution that will either cripple the nation's authority or prostrate the nation at the feet of the States, or that will deprive the States of their just powers. Let us hold fast to the broad and liberal, and yet safe, rules of constitutional construction approved by the fathers and established by judicial decisions. In so doing we will sustain our dual system, under which the Government of the Union is forbidden to exercise any power not granted to it expressly or by necessary implication, while the States will not be hindered or fettered in the exercise of powers that have not been surrendered by them to the Union and are not inconsistent with the Constitution.

Mr. President, I owe an apology for saying this much. There are other speakers to follow, whom I know you are eager to hear. But I can not take my seat without thanking the Kentuckians now residing in this imperial city for the high honor they have done me on the occasion of this magnificent banquet. The memory of your cordial greeting will abide with me to my life's end and will be a sweet heritage for my children. During all the years of a life now quite extended—much of which has been passed in the nation's service, away from my native State—there has never been a moment when I did not have an abiding affection for the great-hearted, high-minded, chivalrous people of my Kentucky home, which has been the home of my people since the days before the Revolution. Our old Commonwealth, Mr. President, is indeed a goodly land, "a land of brooks of water, of fountains and depths that spring out of valleys and hills," a land wherein "thou shalt eat bread without scarceness" and "shalt not lack anything in it." And yet well-nigh inexhaustible as are its natural resources, Kentucky's richest possession is in its people. The brave men who first settled the State and made its constitution and laws and guided its affairs during the formative years of its earlier history were worthy scions of a sturdy stock. They were great lovers of liberty and were devoted to the Union. And many of their sons in other States have shed honor upon this Commonwealth and upon the country.

In closing, Mr. President, I must again express my deep satisfaction in the thought that upon all questions affecting the existence of the Union the Kentuckians of 1907 are as thoroughly united as were their fathers when, in 1792, our Commonwealth became, to use the words of Congress, "a new and entire member of the United States of America." Her people, we are glad to know, have outgrown the feelings of distrust and animosity that divided them in the perilous times of 1861, and their faces are now turned steadily and hopefully to the future, determined that Kentucky shall play her full part in the building up of our beloved country in all that makes for true national greatness.

And if, to-night, it were possible for me to send a message to the young men of my native State—of whatever political parties they are members—it would be this: Forget the things that are behind, save only the noble deeds of the mighty dead who gave Kentucky its large place in the early history of the nation. Quench whatever remains, in both parties, of the baleful fires of narrow partisanship and mere faction. Crush the monster of lawlessness in whatever way its evil deeds are manifested. Maintain the rights of all. While remaining loyal to whatever may be your various polit-

ical affiliations, strive after large, generous, and broad policies and lift the State steadily toward higher levels. Work shoulder to shoulder in the effort to build up our grand old Commonwealth in all things that will contribute to its moral, intellectual, and material welfare. Thus you will help most effectively in giving Kentucky a worthy place among those States that shall lead the nation in its noble mission of commending to the world the priceless blessings of institutions that rest upon the consent of the governed and recognize the inherent rights of man as man.

IN RE BILL FOR EXTENDING TIME FOR CONSTRUCTION OF DAM IN RAINY RIVER.

To the House of Representatives and Committee on Interstate and Foreign Commerce.

GENTLEMEN: The President has returned without his approval H. R. 15444, relating to the construction of the dam in Rainy River, and the general grounds of his disapproval are, as we understand them, three in number: First, that the company has not been diligent in prosecuting the work under permits heretofore granted; second, that there should be some time limit to the grant; and third, that there should be some compensation to the United States.

Rainy River is the international boundary. The land on the Minnesota shore was patented in 1884 to Alexander Baker and the patent is recorded in volume 11, page 381, in the office of the recorder of the General Land Office. The patent was issued under the United States homestead laws. The present owners have succeeded to Mr. Baker's title.

We think the following propositions are as clearly and fully established by the decisions of the highest courts as any propositions of law can be:

1. United States patents are construed according to the law of the States in which the lands lie.

2. In the State of Minnesota a Government patent of shore lands without restriction or reservation carries to the grantee everything which the United States has power to grant and any attempt to make a subsequent grant is void.

3. The riparian owner has the exclusive right to occupy and use and he may sever and convey the right to use the shallow waters adjacent to his lands in any way not detrimental to the public right of navigation.

4. Among the rights of a riparian owner is the right to use the flowing water for power purposes by the usual methods, doing no injury to the public right of navigation.

5. In the State of Minnesota the title to navigable waters and the soil under them is in the State in its sovereign capacity in trust for public uses.

6. The State can not use these waters nor the soil under them for any revenue purposes.

7. The power of Congress respecting navigable waters is derived from the commerce clause and is limited to that which is necessary to preserve or promote the public right of navigation.

The first bill permitting the construction of this dam was passed in 1898. There was not at that time a railroad within 75 miles in any direction. It was not possible to improve this water power without a railroad to bring in materials, especially tools, machinery,

and Portland cement. The Canadian side was owned by the Province of Ontario, and it was not possible to improve the power except by a single dam extending from shore to shore. Efforts were commenced immediately to secure a contract from the Province of Ontario for the right to improve the power. No contract was obtained until February, 1905. In 1901 the Canadian Northern Railroad reached the location on the Canadian side. This made it possible to bring in building materials but did not afford any access to markets for manufactured products, because the only possible market is the American market. No railroad had been built on the American side within about 60 miles and there was no promise or assurance that the American lines would ever extend to this point. Nevertheless immediately after a contract had been secured from the Province of Ontario, the contract was let for the construction of the dam and work was commenced as soon as the contractors could get their equipment on the ground. Work actually began in April, 1905. Between that time and July, 1907, several hundred thousand dollars were expended and the larger part of the structure of the dam was actually built. In July, 1907, on account of the advanced cost of construction and particularly on account of high wages, the contractors were unable to proceed with their contract and quit work. The money stringency existing between that time and the present has prevented the letting of a new contract, but negotiations have been under way and are near the point of completion for the letting of a new contract and the resumption of work.

In the year 1906 the Minnesota and International Railway Company, a proprietary line of the Northern Pacific Railway Company, had reached Big Falls, a point distant about 35 miles from International Falls, where the dam is located. The officers of the Northern Pacific Railway Company affirmed that its line would not be extended toward International Falls at any time in the visible future. The owners of the Rainy River Improvement Company and of the water power organized a railway company and entered into a contract for the construction of these 35 miles of railroad. This contract was made in October or November, 1906, and the contractors immediately put a force of men on the line to do the grading. After the work was commenced the officers of the Northern Pacific Railway Company receded from their former position, organized a new company called the Big Fork and International Falls Railway Company, and took over the work of building the line. The line reached International Falls in November, 1907, but train service did not begin until December.

The money, amounting to several hundred thousand dollars, which had already gone into the work, and the liability assumed for the completion of the contract, amounting to other hundreds of thousands, was all expended and incurred in anticipation of the building of this road and without which it was impossible either to reach any market for disposing of manufactured products or to bring in the raw materials for the operation of mills to use the power which was to be developed.

The Rainy River Improvement Company claims that it has been diligent, and more than diligent, in prosecuting the work which it was authorized to do by former Congressional action. It also claims that, irrespective of the question of its own diligence, the United States

has, under the Constitution, power only to see that the Rainy River Improvement Company, in improving, developing, and using its own property, shall do no injury to the public right of navigation. It claims, furthermore, that the proposed works not only will not obstruct navigation, but will greatly improve navigation. The dam is located 2 miles from the outlet of Rainy Lake. At the head of the river are rapids, over which passage is both difficult and dangerous. Many lives have been lost in these rapids, one, the life of a United States collector or deputy collector of customs, within the week past. The proposed dam will raise the water at the dam by 6 feet or more and will entirely flood out the rapids at the mouth of Rainy Lake and raise the level of the lake itself by several feet. Rainy Lake has an area of approximately 300 square miles. The lake will constitute a storage reservoir, and by means of this reservoir and the operation of the dam the flow of Rainy River below the falls will be to a large extent equalized. The depth of water in low stages will be increased by probably 2 feet. The improvement to navigation by the construction and operation of this dam will be greater than is likely ever to be brought about by any other means.

Before the construction of the Canadian Pacific Railroad this water route was the principal highway between eastern and western Canada. The Dominion government in the seventies commenced the construction of a lock at this point. When the construction of the Canadian Pacific Railroad was determined upon, in about 1878, work upon this lock was abandoned and has never been resumed. While the stream is navigable, the amount of commerce over it, chiefly Canadian commerce, is not large and is decreasing with the construction of railroads. The principal commerce now is in the floating of loose logs, for which no lock is necessary.

Our position is that the permission of Congress to construct this dam is in the nature of a building permit only, to enable the Government and its officers to exercise a supervision and to see that no injury is done to navigation. To exact more than an ordinary fee for the purpose of defraying the expense of this supervision while the work of construction is in progress, and especially to exact an annual fee or rental, would be to deprive the present owners of their property without due process of law. To fix a time limit to such permission and to attempt to dispose of the rights to others at the expiration of such time limit would be an attempt at absolute confiscation of property.

The foregoing facts were not laid before the President and we have no doubt that his action was taken under a complete misapprehension.

In conclusion we cite without quoting decisions of the highest courts, including the Federal Supreme Court, which we believe fully sustain the positions we have taken:

Kansas *v.* Colorado (206 U. S., ——, and cases there cited); Lamprey *v.* State (52 Minn., 181); Crookton Water Works Power and Light Company *v.* Sprague (91 Minn., 461, and cases there cited); Gilbert *v.* Emerson (55 Minn., 254, and cases there cited); Rossmiller *v.* State (114 Wis., 169); United States *v.* Chandler-Dunbar Water Power Company (81 C. C. A., 221, affirmed in Supreme Court April 20, 1908).

Respectfully submitted.

RAINY RIVER IMPROVEMENT COMPANY,
By C. J. ROCKWOOD, *Secretary.*

Supreme Court of the United States. No. 599. October term, 1907. The United States, appellant, *v.* The Chandler-Dunbar Water Power Company. Appeal from the United States circuit court of appeals for the sixth circuit. April 20, 1908.

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill in equity brought by the United States to remove a cloud from its alleged title to two islands, numbered 1 and 2, in the Sault Ste. Marie, between Lake Huron and Lake Superior. The islands are in the rapids of the river or strait, on the American side of the Canada boundary line, and near to a strip of shore lying between the rapids and the United States ship canal referred to in United States *v.* Michigan (190 U. S., 379). The defendant claims this strip and the islands under a patent from the United States, dated December 15, 1883, describing the land as bounded by the river St. Mary on the east, north, and west. The United States says that the patent was void because the land had been reserved for public purposes, and that even if it was valid the islands did not pass. The defendant replies that the land was not reserved, and also sets up the statute of limitations. (Act of March 3, 1891, c. 561, § 8; 26 Stat., 1099.) The circuit court dismissed the bill, and its decree was affirmed by the circuit court of appeals. (152 Fed. Rep., 25.)

There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the land department. United States *v.* Winona and St. Peter Railroad Company (165 U. S., 463, 476). The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to "any patent heretofore issued," it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell *v.* Warren (2 Black, 599).

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land at least, which can not escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell *v.* Warren (2 Black, 599, 605); Sharon *v.* Tucker (144 U. S., 533); Davis *v.* Mills (194 U. S., 451, 457). This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States *v.* Winona and St. Peter Railroad Company (165 U. S., 463, 476).

We waste no time upon suggestions of bad faith on the one side or the other, as there is no sufficient warrant for them, and as they were touched rather than pressed at the argument. The only other question is whether the United States has title to the islands, notwithstanding its patent and notwithstanding the incorporation of Michigan as a State. The bill admits and alleges that the bed of the river, or strait, surrounding the islands, passed to Michigan when Michigan became a State—Pollard *v.* Hagan (3 How., 212), Shively *v.* Bowlby (152 U. S., 1)—subject to the same public trusts and limitations as lands under tide waters on the borders of the sea. Illinois Central Railroad Company *v.* Illinois (146 U. S., 387). But it sets up that the islands remained the property of the United States, and it argues that in such circumstances the islands did not pass by the patent of the neighboring land.

The act offering Michigan admission to the Union provided that no right was conferred upon the State "to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said State." (Act of June 15, 1836, c. 99, § 4; 5 Stat., 49, 50.) And, again, by a condition that the State should "never interfere with the primary disposal of the soil within the same by the United States." (Act of June 23, 1836, c. 121. Fifth. 5 Stat., 59, 60.) The islands are little more than rocks rising very slightly above the level of the water, and contain, respectively, a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We can not think that these provisions excepted such islands from the admitted transfer to the State of the bed of the streams surrounding them. If they did not, then, whether the title remains in the State or passed to the defendant with the land conveyed by the patent, the bill must fail.

The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like Illinois Central Railroad Co. *v.* Illinois (146 U. S., 387). This view is well established. Grand Rapids and Indiana R. R. Co. *v.* Butler (159 U. S., 87, 93, 94), Hardin *v.* Shedd (190 U. S,. 508, 519). The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shivley *v.* Bowlby (152 U. S., 1, 47), are that the State may use or dispose of any portion of the same "when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce." But it can not be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interest of the public in the waters of the Sault Ste. Marie. See Kaukauna Water Power Co. *v.* Green Bay and Mississippi Canal Co. (142 U. S., 254, 271, 272). Therefore, if by the law of Michigan the bed of the river or strait would pass to a grantee of the upland, we may assume that it passed to the defendant, and we may assume further that the islands also passed. If, as we think, they belonged to the State, they passed along with the bed of the river. If they had belonged to the United States, probably they would have passed as unsurveyed islands and neglected fragments pass. Whitaker *v.* McBride (197 U. S., 510). Grand Rapids and Indiana R. R. Co. *v.*

Butler (159 U. S., 87, 91, 92). Of course other nice questions are suggested and might be asked; for instance, how it would be if the title to the bed of the stream was in the State and did not pass with the upland and the islands remained to the United States. It still would be a reasonable proposition that the islands followed the upland. But in the view that we have taken that may be left in doubt.

The question, then, is narrowed to whether the bed of the strait is held to pass by the laws of Michigan. We are content to assume that the waters are public waters. Genesee Chief *v.* Fitzhugh (12 How., 443, 457). But whatever may be the law as to lands under the Great Lakes, People *v.* Silberwood (110 Mich., 103), we believe that the law still is as it was declared to be in Grand Rapids and Indiana R. R. Co. *v.* Butler (159 U. S., 87, 94,) that "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof," and that this applies to the Sault Ste. Marie, whatever it be called. The fact that it is a boundary has not been held to make a difference. The riparian proprietors upon it own to the center. Ryan *v.* Brown (18 Mich., 196); Scranton *v.* Wheeler (113 Mich., 565, 567); Kemp *v.* Stradley (134 Mich., 676). See also Scranton *v.* Wheeler (57 Fed. Rep., 803, 812; S. C. 179, U. S., 141, 163); Lorman *v.* Benson (8 Mich., 18); Water Commissioners *v.* Detroit (117 Mich., 458, 462). We see no plausible ground for the claim of the United States.

Decree affirmed.

Mr. Justice HARLAN dissents.

[Senate Report No. 585, Sixtieth Congress, first session.]

DAM ACROSS JAMES RIVER IN STONE COUNTY, MO.

The Committee on Commerce, to whom was referred the bill (H. R. 17707) to authorize William H. Standish to construct a dam across James River, in Stone County, Mo., and divert a portion of its waters through a tunnel into the said river again to create electric power, having considered the same, report thereon with a recommendation that it pass without amendment.

Following is a copy of the House report on the bill:

[House Report No. 1256, Sixtieth Congress, first session.]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 17707) to authorize William H. Standish to construct a dam across James River, in Stone County, Mo., and divert a portion of its waters through a tunnel into the said river again to create electric power, having considered the same, report thereon with amendments, and as so amended recommend that it pass.

The bill as amended has the approval of the War Department, as will appear by the indorsements attached and made a part of this report.

Amend the bill as follows:

In line 3, page 1, after the word "That," insert "the consent of Congress is hereby given to."

In lines 4 and 5, page 1, strike out "be, and they are hereby, authorized."

In lines 9 and 10, page 1, strike out "that at the narrows in said bend he and they are hereby authorized," and in line 10, page 1, after the word "impound" insert "at the narrows in said bend."

At the end of section 1 add the following:

"*Provided*, That the Secretary of War shall have at all times control of the use of the water, even to the extent of causing the persons, firms, or corporations taking advan-

tage of the privileges granted herein to cease using the water whenever the same may be necessary for navigation: *And provided further*, That should the United States in the work of improving the aforesaid river find it necessary to flood the aforesaid tunnels or in any way affect the flow of water through them, the owners or operators of aforesaid tunnels shall have no claim against the United States for damage on account of said flooding of the tunnels or said effect on the flow of water through them."

Strike out all of section 2 and renumber section 3 to section 2.

[Second indorsement.]

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 11, 1908.

Respectfully returned to the Secretary of War with recommendation that the accompanying bill (H. R. 17707, 60th Cong., 1st sess.) to authorize the construction of a dam across James River, in Stone County, Mo., and to divert a portion of its waters through a channel into the said river again, to create electric power, be amended as indicated in red thereon.

As thus amended I am of opinion that the bill makes ample provision for the protection of navigation interests, and I know of no objection to its favorable consideration by Congress so far as those interests are concerned.

SMITH S. LEACH,
Acting Chief of Engineers.

[Third indorsement.]

WAR DEPARTMENT, *March 12, 1908.*

Respectfully returned to the chairman Committee on Interstate and Foreign Commerce, House of Representatives, inviting attention to the foregoing report of the Acting Chief of Engineers, U. S. Army, and to the accompanying copy of amended bill referred to.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

Following is a copy of a letter of the President received after the bill was referred to this committee:

THE WHITE HOUSE,
Washington, March 13, 1908.

SIR: Numerous bills granting water rights in conformity with the general act of June 21, 1906, have been introduced during the present session of Congress, and some of these have already passed. While the general act authorizes the limitation and restriction of water rights in the public interest, and would seem to warrant making a reasonable charge for the benefits conferred, those bills which have come to my attention do not seem to guard the public interests adequately in these respects. The effect of granting privileges such as are conferred by these bills, as I said in a recent message, "taken together with rights already acquired under State laws, would be to give away properties of enormous value. Through lack of foresight we have formed the habit of granting without compensation extremely valuable rights, amounting to monopolies, on navigable streams and on the public domain. The repurchase at great expense of water rights thus carelessly given away without return has already begun in the East, and before long will be necessary in the West also. No rights involving water power should be granted to any corporation in perpetuity, but only for a length of time sufficient to allow them to conduct their business profitably. A reasonable charge should of course be made for valuable rights and privileges which they obtain from the National Government. The values for which this charge is made will ultimately, through the natural growth and orderly development of our population and industries, reach enormous amounts. A fair share of the increase should be safeguarded for the benefit of the people, from whose labor it springs. The proceeds thus secured, after the cost of administration and improvement has been met, should naturally be devoted to the development of our inland waterways." Accordingly, I have decided to sign no bills hereafter which do not provide specifically for the right to fix and make a charge and for a definite limitation in time of the rights conferred.

Sincerely, yours,

THEODORE ROOSEVELT.

Hon. WILLIAM P. FRYE,
Chairman Committee on Commerce, United States Senate.

The bill, together with the foregoing letter, was referred to the War Department for its views, which are presented in the following indorsements:

[Second indorsement.]

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, April 11, 1908.

1. Respectfully returned to the Secretary of War.

2. The Committee on Commerce of the United States Senate refers H. R. 17707, Sixtieth Congress, first session, being a bill to authorize William H. Standish to construct a dam across the James River, Missouri, and "to divert a portion of its waters through a tunnel into the said river again, to create electric power."

3. This bill was referred to this Department for report during its consideration in the House of Representatives, and, after the usual inquiry through the local engineer officer, was reported on on March 11, 1908, to the effect that, so far as the interests of navigation are concerned, there is no objection to its passage.

4. Subsequently, March 18, 1908, the President of the United States, in a letter to the chairman of the Senate Committee on Commerce, stated that all bills of this character not having provision for a limited life and a remuneration to the United States for the privileges or rights conveyed will fail to receive Executive approval. The Senate Committee on Commerce now desires the opinion of the War Department upon the merits of the bill and the propriety of its passage, "in view of the letter of the President to the chairman of the committee."

5. The Chief of Engineers notes that the bill (H. R. 17707) as it now stands does not comply with either of the President's requirements, and it is not believed that such requirements are provided for in the general dam act of June 2, 1906.

6. The following provision, if inserted in H. R. 17707, after the words "nineteen hundred and six," line 6, page 2, will, it is believed, accomplish the objects aimed at: "and the Chief of Engineers and the Secretary of War shall, in accordance with said act, and as a part of the conditions and stipulations provided for therein, fix such limitation of time for the privilege hereby permitted, and such charge or charges for the same as they may deem necessary to protect the present or future interests of the United States."

The details as to time and amount in each case will depend upon the facts in each case, including amount of investment relative to the interests of navigation, and the amount of future responsibility which may have to be assumed by the Government in the matter of proper maintenance of dams, operation of locks, and other items, including possible failure of grantee, which may bear upon any liabilities which the Government by chance might possibly be called upon to assume. While in the form of legislation suggested no definite time or amount is considered, it is appreciated that in each case such time and amount would require consideration by the grantor in advance of preliminary work by the grantee.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

[Third indorsement.]

WAR DEPARTMENT, *April 14, 1908.*

Respectfully returned to the chairman Committee on Commerce, United States Senate, concurring in the foregoing views of the Chief of Engineers, U. S. Army.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

Following is the amendment suggested by the War Department:

Insert on page 2, line 6, after the word "six," the following:

and the Chief of Engineers and the Secretary of War shall, in accordance with the terms of said act, impose conditions and stipulations fixing such limitation of time for the privilege hereby permitted and such charge or charges for the same as they may deem necessary to protect the present or future interests of the United States.

The President, in a communication addressed to the chairman of the Senate Committee on Commerce, dated March 18 last, as well as in his veto message of April 17, relating to the bill (H. R. 15444) to extend the time for the construction of a dam across Rainy River, has

declared it to be his policy not to approve of any bill permitting the construction of a dam by private parties across a navigable stream, although due provision is made for the conservation of the stream for the purposes of navigation, unless the bill provides for the payment of a royalty or compensation to the United States for the use of the water of the stream for purposes other than navigation.

This is a new departure from the policy heretofore pursued in respect to legislation authorizing the construction of such dams, and in view of this fact it becomes important to inquire whether the Government of the United States has the right to require compensation for the use of water in such streams for purposes other than navigation.

The common-law doctrine of England that a stream is not deemed to be a navigable water course unless the tide ebbs and flows in it is not the law in this country. The question whether a water course is a navigable stream is one of fact. If it is capable of being used for the purposes of trade and commerce in any mode, even for floating rafts of logs and timber, it is deemed to be a navigable stream.

(The Montello, 20 Wall., 430.)

(St. Anthony Water Power Company *v.* St. Paul Water Commissioners, 168 U. S., 349.)

The title to the water of a navigable stream within the borders of a State is not in the Federal Government, but in the State; and title to the banks and bed of the stream, after the Federal Government has parted with its riparian lands, is either in the State or in the riparian owner, or both, according to the laws of the respective States. These principles have been laid down and applied by the Supreme Court of the United States in the following, among other, cases, and is the settled law of the land, to wit: Martin *v.* Waddell (16 Pet., 367); Pollard *v.* Hagan (3 How., 212); Goodtitle *v.* Kibbe (9 How., 471); Barney *v.* Keokuk (94 U. S., 324); St. Louis *v.* Myers (113 U. S., 566); Packer *v.* Bird (137 U. S., 661); Hadrin *v.* Jordan (140 U. S., 371); Kaukauna Water Power Company *v.* Green Bay and Mississippi Canal Company (142 U. S., 254); Shively *v.* Bowlby (152 U. S., 1); Water Power Company *v.* Water Commissioners (168 U. S., 349); Kean *v.* Calumet Canal Company (190 U. S., 452); United States *v.* The Chandler Dunbar Water Power Company (U. S. Supreme Court, April 20, 1908).

The use of water in such a stream is a matter of State regulation and State control. In many of the States the common-law rule, as defined in the following language of Chancellor Kent, prevails, to wit:

> Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he can not unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate.

In the mining and arid States the rule of prior appropriation for mining and irrigation purposes prevails, and this rule of the States has been recognized by Federal statutes (R. S., secs. 2339–2340). In some of the States there is a mixed application, as in California, of the common-law rule and the rule of prior appropriation.

But whatever rule may prevail in any State as to the use of the water in a stream, it is always subject to the following limitations, laid down by the Supreme Court in the case of the United States *v.* Rio Grande Dam and Irrigation Company (174 U. S., 690):

> Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of water; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any State action.

Where the Federal Government is not interested as the owner of riparian lands, the only interest it has in the water of a stream is as to its use for purposes of navigation and it can lay no claim to the use of the water for any other purpose, not even for irrigation. (Kansas *v.* Colorado, 206 U. S., 46.)

In this case the United States appeared as intervener, but inasmuch as it founded its claim not on the question of navigation but on the question of irrigation, the court held that it had no ground for intervention, and dismissed its petition. In reference to this subject the court says:

> It follows from this that if in the present case the National Government was asserting as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson, in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.
>
> It rested its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands. * * *
>
> Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. * * *
>
> While arid lands are to be found mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation.

It was the doctrine at common law that a grant of land upon the borders of a navigable stream carried the grant only to high-water mark, while a grant of land bordering upon a nonnavigable stream carried the ownership to the center or thread of the stream, subject to the public easement.

In the case of Hardin *v.* Jordan (140 U. S., 384), the Supreme Court states:

> The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant.

Further on the court states the same principle in this form:

In our judgment the grants of the Government for lands bounded on streams and other waters without any reservation or limitation of terms are to be construed as to their effect according to the laws of the State in which the lands lie.

The rule of riparian ownership as to grants of land bordering on a navigable stream is diverse in the various States. Some States hold that the grant extends only to high-water mark; other States hold that it extends to low-water mark, while another class of States—and perhaps the most numerous—hold that the grant extends to the middle of the stream, subject to the public easement in the water of the stream. But whatever may be the law in this respect as to the effect of the grant, it only relates to the proprietorship in the banks and bed of the stream and not to the ownership of the water in the stream.

In those States which hold that the title of the riparian owner only extends to the high or low water mark the title to the bed of the stream is deemed to be in the State, and whether the title to the bed of the stream is in the riparian owner or in the State, in either case the general title to the water of the stream is deemed to be in the State, but it holds it not absolutely but in trust for all lawful public uses. The State's interest in such a stream is akin to that of a riparian owner, though more comprehensive and general in its nature, and does not exist in hostility to or in diminution of the rights of the riparian owner.

(Rossmiller *v.* State, 114 Wis., 169.)
(Peoples Ice Co. *v.* Davenport, 149 Mass., 322.)
(Brown *v.* Cunningham, 82 Iowa, 512.)
(Braston *v.* Rockport Ice Co., 77 Maine, 100.)
(Martin et al. *v.* Waddell, 16 Peters, 367.)

From the foregoing it will appear that there are three different parties who are interested in the waters of a navigable stream:

1. The United States.
2. The State in which the stream is located.
3. The riparian owner.

The interest of the United States is derived from and rests upon that parargaph of the Constitution which gives Congress the power to regulate interstate commerce, and this power only extends to the extent of conserving the navigability of the stream. Beyond that the Federal Government has no interest or property in the stream.

The interest of the State in the stream is derived from its sovereignty, and it holds its property in the stream in trust for all public uses but in subrogation to the rights of the Federal Government as to navigation and of the riparian owner. The right to the use of the waters of a stream for any lawful purpose, outside of the right of navigation, belongs wholly to the State and the riparian owner.

(Martin et al. *v.* Waddell, 16 Peters, 367.)

Chief Justice Shaw, in the case of Elliott *v.* Fitchburg Railroad Company (10 Cushing, 191), describes the rights of the riparian owner in the use of water in a stream in the following language, which states the enlarged and modified common-law doctrine:

The right to flowing water is now well settled to be a right incident to property in the land; it is a right, publici juris, of such a character that, while it is common and equal to all through whose land it runs, and no one can obstruct and divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable

use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending upon various circumstances. To take a quantity of water from a large running stream for agricultural or manufacturing purposes would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is therefore to a considerable extent a question of degree; still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use and for manufacturing and agricultural purposes. * * *

That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor can not under color of that right or for the actual purpose of irrigating his own land wholly abstract or divert the water course or take such an unreasonable quantity of water or make such unreasonable use of it as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably. * * *

This rule that no riparian proprietor can wholly abstract or divert a water course by which it would cease to be a running stream, or use it unreasonably in its passage and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. * * *

The right to the use of flowing water is publici juris, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing part their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a smilar right in all the proprietors to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit or for an unreasonable and unauthorized use of it that an action will lie.

The doctrine of prior appropriation, already referred to, is thus described by Justice Field in the case of Jennison *v.* Kirk (98 U. S., 453). After describing the system of discovery and appropriation and development of mining claims, he adds the following:

But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities when they were not on the bank of a stream or lake became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such locality for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrine of the common law respecting the right of riparian owners was not considered as applicable, or only in a very limited degree, to the conditions of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and for the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands.

These water rights, by prior appropriation, as described by Justice Field, were recognized and confirmed by Congressional legislation in

1866 and in 1870. Those acts are now sections 2339 and 2340 of the Revised Statutes. Justice Field further adds:

It will thus be seen that the Federal statutes merely gave a formal sanction to the rules already established. Those rules had been built up in reliance on the tacit acquiescence of the United States, the true owner of the lands and waters on which appropriations were made, and these statutes acquiesced therein expressly, "a voluntary recognition of a preexisting right rather than the establishment of a new one."

In the case of Broder *v.* Natoma Water Company (101 U. S., 274) the Supreme Court, in referring to the contention that these statutes established a new right, uses the following language:

We are of the opinion that it is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

These decisions of Judge Shaw, of Massachusetts, and of Justice Field, of the Supreme Court, describe fully the rigdts of the riparian owners to the use of the water both under the doctrine of the common law and under the so-called doctrine of prior appropriation, and the case of Rossmiller *v.* The State (114 Wis., 169), and the cases therein rereferred to, as well as the case of Martin et al. *v.* Waddell (16 Peters, 367), show the interest and property of a State in the waters of a stream.

From the foregoing statement and citation of authorities it is evident that the only use of the waters of a stream in which the United States has any property is its use for purposes of navigation. In the use of the stream for any other purpose the Federal Government has no property and hence has nothing to sell or to exact compensation for.

The plan proposed by the President would deprive the States and the riparian owners of their rights in the use of the water of a navigable stream now vested in them by law, and would concentrate the entire disposal and control in the Federal Government, a power which neither the States nor the riparian owners can, with justice or safety, for a moment concede. But assuming for the sake of the argument that the Federal Government can lay a tribute in such cases as is proposed by the President, it can not be under the interstate-commerce clause of the Constitution, but must be under section 8 of article 1, which reads as follows:

SEC. 8. The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Such a tribute must be either a direct tax or in the nature of an impost or excise tax. If a direct tax, it can not be levied directly by the Federal Government, but must be apportioned among the States, leaving each State to make the collection; and if an impost or excise tax, then it must be levied by the rule of uniformity upon very dam and water power in the United States not constructed directly or indirectly by the Federal Government. In other words, there must be a general excise law on the subject. The power of

the Federal Government over the navigable streams of the country is no greater in the so-called Western or public-land States than in the New England States. If a tribute can be levied on a dam and water power in Minnesota or Colorado, it can be levied on a dam and water power in Maine or Massachusetts, for the power of the Federal Government over navigable streams is the same in the one case as in the other. In the case of Pollock *v.* Farmers Loan and Trust Company (157 U. S., 557) the court states:

> Thus in the matter of taxation the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes and the rule of uniformity as to duties, imposts, and excises.

In the case of Thomas *v.* United States (192 U. S., 363), Chief Justice Fuller says:

> And these two classes, taxes so called, and "duties, imposts, and excises," apparently embrace all forms of taxation contemplated by the Constitution. As was observed in Pollock *v.* Farmers Loan & Trust Company (157 U. S., 429, 557), "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts, and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue. * * *"
>
> There is no occasion to attempt to confine the words duties, imposts, and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.

An act authorizing the construction of a dam is, so far as the United States is concerned, a mere revocable license or privilege, and if a tax can be imposed on such a privilege it must be general and uniform throughout the United States. It must apply to all dams and water powers on navigable streams throughout the entire country.

Nearly all navigable streams in their upper and more remote courses are not, as a matter of fact, navigable, and in such reaches of the river dams can be erected and water powers created under State authority and State license, and so long as such dams and water powers do not materially injure or diminish the navigability of the stream in its navigable portions the Federal Government has no ground for interference. It has been customary, however, in many of such cases to apply to Congress for a Federal license, and the granting of it, while not necessary, serves a twofold purpose, first, that it authorizes the Federal Government, through the War Department, to control and direct the construction of the dam, and, second, that it recognizes the fact, which might otherwise require proof, that the dam will not affect the navigability of the stream in its navigable portions.

(Kansas *v.* Colorado, 206 U. S., 46.)

(United States *v.* Rio Grande Company, 174 U. S., 690.)

And in such cases it is of as much advantage to the United States as to the grantee of the license to have Congressional action and recognition, but in such cases the Federal Government has nothing to sell and therefore has no moral or legal ground to demand compensation in any form.

For reasons above given the committee report the bill without the amendment recommended by the War Department.

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HEARINGS

BEFORE THE

U.S.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
OF THE HOUSE OF REPRESENTATIVES

ON H. R. 15444

EXTENDING THE TIME FOR CONSTRUCTING A DAM ACROSS RAINY RIVER

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EXTENDING TIME FOR CONSTRUCTION OF A DAM ACROSS RAINY RIVER.

[President's veto of H. R. 15444.]

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Tuesday, May 5, 1908.

Subcommittee: Hon. Frederick C. Stevens (chairman), Hon. John J. Esch, Hon. William P. Hubbard, Hon. Charles L. Bartlett, and Hon. William Richardson.

STATEMENT OF HON. JAMES R. GARFIELD, SECRETARY OF THE INTERIOR.

Mr. STEVENS. Secretary Garfield desires to submit a statement to the subcommittee upon the subject that we have under consideration.

Secretary GARFIELD. In connection with H. R. 15444, which I understand the subcommittee now has under consideration, it is desired that I make a general statement regarding the attitude of the Administration toward this particular bill and its general position toward the question of similar legislation affecting water power.

As regards this particular bill, I am advised that there was not before presented, at the time the bill was vetoed, all the facts which have since developed relating to the character of the work that had been done by the company which is seeking to have this act passed, which is a renewal of previous acts. In the veto message of the President there were five provisions which the President suggested as essential provisions for measures of this character, and it was desired, as to two of those particularly, that a statement be made to the subcommittee to indicate more in detail the reason why those provisions were essential.

The first one, as to the limitation in time, that instead of there being granted an indefinite, or what would be a perpetual right, in case the conditions of construction were complied with, the President has felt that there should be a limited grant made, say, for example, a grant of ninety-nine years, which, while long in one sense, is not long when considering the life of a nation and the amount of the investment and extent of the work involved in this and other similar enterprises. We are at present engaged in the development of water power, and no one knows how far it is going to extend or of what value these water powers may be in the years to come. It has been felt, therefore, that there should be a definite limitation of time in all grants of this character, to the end that the future generations would not be bound by the giving of a grant to individuals for the exercise of power in the development of water power which is used primarily, of course, for the benefit of the corporation which is developing it, and is sold to the public for various manufacturing or other purposes. It is therefore felt to be very essential that in all such grants there should be this limitation of time, and the limit in

each instance should be determined by the character of the work, the magnitude of the investment, and the interests involved, as well as the purpose to which that power is to be devoted.

Next the question comes up as to what limitations or conditions should be imposed by the Federal Government in making such grants. One which has been felt to be exceedingly necessary is that of making a charge. I am aware that there are legal questions involved in this, and therefore I shall speak very briefly on the general proposition of the power of the Government to make any charge, the amount in each instance to be determined by the character of the improvement and the various elements, or, rather, the various conditions, of the work itself. The suggestion to Congress that a charge be made is based upon the general power of the Federal Government over navigable streams. In this instance we have not only the question of navigation, but we likewise have an international question concerning which I shall speak a little later. Congress has the power, absolutely, to determine how and where a navigable stream shall be either diverted or dammed or used, and may impose such conditions as it determines. Now, generally, the Secretary of War is given power——

Mr. HUBBARD. May it impose conditions, Mr. Secretary, further than the matter of navigation is concerned?

Secretary GARFIELD. That I will come to in connection with my general statement, Judge. The power of the Secretary of War is in effect an absolute power. He may withhold a request for the building of a dam, or the construction of any work that might be deemed an obstruction to navigation, or a change in the line of piers, or the harbor line, or the current of a river.

Mr. RICHARDSON. If you will allow me to interrupt you, you state that the Secretary of War may withhold his consent to the erection of a dam. Do you not believe that that depends entirely upon whether it is an interference with or an obstruction to navigation at all? Suppose it does not interfere with navigation?

Secretary GARFIELD. The difficulty there, I think, would be this: The statute does not indicate on what ground the Secretary of War may or may not give his consent; it is left discretionary with him. It is not necessary for him to give his reasons for any specific action. If he wishes to refuse the right to construct a bridge he may do so; if he wishes to refuse the right to build a dam he may do so. What is in his own mind as his reason for that it is not necessary for him to give.

Mr. RICHARDSON. I know that, but the courts have settled that question as to whether it interferes with navigation or not, because that would involve the great question as to how far the jurisdiction of the Government extends over navigation.

Secretary GARFIELD. No doubt there might be elements of that kind, but I do not know of any case where the court has compelled the Secretary to permit construction of that kind when he has decided not to do it; in other words, the courts would not attempt to compel the Secretary of War to exercise affirmatively that power.

Mr. HUBBARD. But if the court was satisfied that the work proposed did not affect the navigable qualities of a stream, might it no say, "You can go on and construct this work for that reason?"

Secretary GARFIELD. In that case the court would take the position that it was subject-matter not within the jurisdiction of the Secretary, therefore it would not be necessary for the Secretary to have exercise of discretion.

Mr. HUBBARD. Is not that question at the foundation of all five objections, that is: What is the nature of the property the National Government has in flowing waters of a navigable river?

Secretary GARFIELD. I hardly think that that goes to the root of the question. It seems to me that if it is not a navigable stream the courts may hold, and would hold, that the War Department has no jurisdiction over it. If it be a navigable stream, I am not aware of any instance where the courts have overridden the determination of the Secretary of War in regard to his decision as to what use should be made of that stream or how works should be constructed or where.

Mr. STEVENS. Is not the preliminary question to all of that, Mr. Secretary, whether or not there is any limit to the discretion of the Secretary of War; that is to say, can he do this, can he fix such conditions in making the grant as he sees fit?

Secretary GARFIELD. That of course is the basis upon which the President has made these recommendations; his belief that, because of the navigability of the stream, the discretion of the Secretary of War is not limited by any statute as to what conditions he may impose.

Mr. STEVENS. Is he limited by the Constitution?

Mr. RICHARDSON. The power and authority of the Secretary of War is limited by the Constitution?

Secretary GARFIELD. Without doubt.

Mr. RICHARDSON. And he can not exceed the jurisdiction that the Federal Government has over navigable streams?

Secretary GARFIELD. Of course that is accepted as elemental.

Mr. RICHARDSON. There would have to be proof to show whether that dam across the river really interfered with navigation, and that would have to be by proof, and the court would have to settle it.

Secretary GARFIELD. That might be so, although my impression is that the court would take the view there, as they have in many other instances with regard to executive discretion, that where Congress has given to the Executive full discretion to act upon any given subject-matter, that the courts will not interfere with the exercise of that discretion unless in the exercise of the discretion the executive officer has exceeded the authority either granted in the statute or that granted in the Constitution itself.

Mr. RICHARDSON. Now, I think the great trouble will come up at that point, which is that the custom of the country has dropped into, and properly so, too, of getting the consent of the Secretary of War before anything is done in the way of limiting navigation, when we ought to remember in that connection that the statute could not give the Secretary of War any greater jurisdiction than the Constitution gives.

Secretary GARFIELD. You are quite right about that, but the action of the Executive Department not only in this but in similar matters where the Interior Department has been concerned, has always been based primarily upon the Federal jurisdiction being

granted. Now, if Federal jurisdiction is not granted, then of course the individual might instantly go into court and set up the fact that this is not a question under the jurisdiction of the Federal Government, and therefore no consent is necessary, and proceed to carry out any plan he saw fit; and if the Federal Executive felt that there was an infringement upon the prerogative of the Executive, he would test the question in court by injunction proceedings.

Mr. HUBBARD. Does the discretion of the Secretary under the Constitution extend to anything which does not relate to the navigation of the river?

Secretary GARFIELD. I should answer that, yes, in one way, and in another way I should say this: That the definition of what is included in "navigation" has changed from year to year, and as there have been new uses to which water has been put, and there have been new methods developed for navigation, and there have been indirect advantages that may be gained to navigation, that the power would be extended in accordance with those new developments.

Mr. HUBBARD. Does the jurisdiction of the Secretary under the Constitution extend to anything with regard to the control of navigable streams which is not connected, even indirectly with the navigation of that stream?

Secretary GARFIELD. I should say not.

Mr. HUBBARD. Very good. Then are you suggesting that the Secretary of War, because the statute enables him to pass upon applications for the construction of a dam as to which his constitutional discretion extends only to the effect of that dam on navigation—that he may take advantage of his position so as to require something to be done in regard to that stream which is not within his constitutional power?

Secretary GARFIELD. Certainly I should not want him to do anything not within his constitutional power.

Mr. HUBBARD. If under the Constitution the Government has no right or property of any kind in the flowing waters of a navigable stream other than that which is necessary to see that the navigable quality of the stream be not interfered with, can the Secretary of War insist that something should be paid for the use of the head of that water to develop power, something should be paid for the use of that water for irrigation, something should be paid for the ice that might be cut off that stream when it is frozen?

Secretary GARFIELD. If in the payment this money, as it will, goes back into the public Treasury, it is very proper that either Congress or the Secretary, as the case may be, should require that the persons using that dam should pay to the Federal Government some sum, whatever it may be, that ultimately goes into the public Treasury and is used for the very purpose of developing navigation either at that point or lower down on the river.

Mr. RICHARDSON. Where the Government erects dams, and incidentally creates water power, then the Government has a right to come in and make a charge, where the expenditure of public money in the construction of any work creates and develops water power. Now, where a man comes in, or a private corporation, to use this, it is, I think, undoubtedly true that the Government has a right to put a charge on it; why? Because it is through the expenditure of

public money that the development of that power is brought about. But where the Government has not spent anything, I do not understand, under the Constitution, what power the Secretary of War would have to prescribe a charge.

Secretary GARFIELD. If you admit that the Government can charge for power used if the Government has erected a dam and spent the public money, do you not admit practically the entire proposition, because the Government, instead of spending its own money, says to some of its citizens who are willing to invest their money:

> You can put in the work instead of us, and instead of charging you for the water power which we might charge for if we put in the work, we will charge you a nominal sum, whatever it may be, for the power which you develop, and that sum will go into the public Treasury and will be used by the public for the construction of works either below or above, or some other place affecting navigation.

It seems to me that if you admit that the Government has a right to charge for water power where the dam which creates it has been erected by the expenditure of its own money, that you admit the proposition that you should make a charge to a private individual or corporation to which it gives a grant for the construction of the same work.

Mr. RICHARDSON. I do not agree with you there; not at all. In one case the Government has used an expenditure of public money and has created the dam or water power or works or whatever it may be which incidentally produces the water power. Now the question arises, the Government not having expended a dollar, but it having expended public moneys in creating those works which incidentally and collaterally produce this water power, has it a right to make a charge?

Mr. STEVENS. As an individual.

Mr. RICHARDSON. As an individual. In the other instance the Government has not expended a dollar.

Mr. STEVENS. What does the Government have there?

Mr. RICHARDSON. Has nothing salable unless it is an interference with navigation.

Mr. STEVENS. Right there. You stated that the Government had a right to exact a compensation to improve the river at the place where the dam is erected or at some place above or below on the river, I presume. I think I can say, so far as I am concerned, that the Government has a right to exact a compensation to improve the river at that point if the person who receives the grant obstructs the river at that point, but——

Mr. HUBBARD. If it interferes with navigation.

Mr. STEVENS. Yes; and the Government has a right to exact a charge to overcome that obstruction and maintain an improvement; but if it exacts more than that to be used at another point, that surplus going into the public treasury for use somewhere else, isn't that in the nature of a tax which can not be exacted under the interstate-commerce clause?

Secretary GARFIELD. I should rather think not. I should think it would be simply a charge depending upon the use at that particular point.

Mr. STEVENS. But what does the Government grant the use of?

Secretary GARFIELD. Of course, it does not grant the use of water; I grant you that. It gives a right to obstruct, and in the giving of that right it imposes conditions, one of those conditions being that

the individual shall not only comply with the physical conditions that may be necessary in the way of the construction of locks, etc., but likewise pay a charge for the exercise of that right, and that charge will be based upon the amount of power developed.

Mr. STEVENS. But is not that a tax?

Secretary GARFIELD. It is a tax in one way; a license fee, which is distinguishable in some degree from a tax because it is the result of a contract rather than the imposition of a charge.

Mr. HUBBARD. If it is a license tax, it must be levied uniformly all over the country on all dams.

Secretary GARFIELD. Not necessarily. There are some characters of taxes charged in the forest reserves, for example, for the conservation of water within forest reserves, where a water-power company either acquires a reservoir site or uses a right of way across it.

Mr. HUBBARD. But there the Government owns the land under the water—owns the riparian rights.

Secretary GARFIELD. Very true; there is a case of ownership of property; in this case it is the control of a right.

Mr. HUBBARD. What is the right that it has control of? That is what I direct your attention to.

Secretary GARFIELD. The right is to keep that stream entirely free from all obstruction.

Mr. HUBBARD. Is there any further right of the Government in that?

Secretary GARFIELD. Yes; for the purpose of navigation.

Mr. HUBBARD. Exactly, and if the dam does not obstruct navigation, but improves it——

Mr. STEVENS. If arrangements are made so that it shall, in the same bill, improve navigation——

Secretary GARFIELD. That is one of the conditions, of course, that may control.

Mr. HUBBARD. Then have you any further right which you can sell to anybody or exact any payment for, whether for license fee or anything else? Do you know anything that you have a right to ask compensation for?

Secretary GARFIELD. It seems to me that you have.

Mr. HUBBARD. What is it, please?

Secretary GARFIELD. There is the difference of opinion upon that proposition. I think that you should not limit the value of that right, if you use the word value, to simply the freedom of that river from obstruction to navigation, but that this is a right which the Government has and may exercise either itself by the construction of a dam or it may permit an individual or corporation to exercise by the construction of a dam. In either case it may provide a method by which there may be some return to the Government in the first instance for a return of the money it may expend——

Mr. HUBBARD. But we are assuming, if you will permit me to say so, that navigation is not injured by this structure, so that there is nothing to be compensated for in that respect.

Mr. ESCH. It may even improve the navigation, as in the case of the Rainy River dam.

Mr. HUBBARD. In this case before us, as I understand it, there are now natural rapids there which prevent a vessel or raft passing either way, and certainly freight must be carried around by portage. The

construction of this dam, as has been stated by witnesses here, will make the situation better instead of worse. Now, what is it the Government ought to be compensated for? The navigation is better than it was before.

Secretary GARFIELD. As to that, in each instance, I should say the value of the right is determined by the conditions in each case.

Mr. HUBBARD. The conditions in this case are as I have suggested them.

Mr. STEVENS. Who fixes the value?

Secretary GARFIELD. That would have to be fixed by Congress under the terms of the act itself, or under a general act giving authority to any executive that Congress might designate.

Mr. STEVENS. Is not there a limitation right there to the power of Congress to exact compensation, or the Executive right to obstruct or improve navigation? Have we anything further to consider than the rights of navigation?

Secretary GARFIELD. There again I can only answer as I have before. It seems to me you have.

Mr. STEVENS. You have made a statement which I think you ought to develop, and which seems to me is the kernel, and that is the right of contract. You stated as a condition which you may exact, that the person, practically by way of contract, shall pay a certain compensation. Do you think that is in the nature of a contract?

Secretary GARFIELD. I think it is, very clearly.

Mr. STEVENS. And you think that Congress, and the Executive Departments through Congress, can contract away the right to obstruct navigation upon such conditions as it may see fit?

Secretary GARFIELD. I think that is exactly what is done with every bill of this kind. Congress imposes certain conditions under which the individual or corporation may construct the obstruction. Now, it may be that the dam is going to be a distinct improvement to navigation. In that case the question of compensation would be a nominal one. On the other hand, it might be that it would be a distinct disadvantage, and in that case the compensation should be a large one.

Mr. STEVENS. The question of contract, it seems to me, is the only serious question that we want to consider at this point. Is not there a limitation of the right of the Government to contract; isn't there a limitation of the right of contract concerning the benefits or the injury to navigation at that point? Is not that the limit of the power of the Government to contract, concerning that particular project?

Secretary GARFIELD. No doubt that is the basis of the right.

Mr. STEVENS. If it has any limitation as to the right of contract, or of compensation, on that point, it has not any right to exact as a condition of that contract any more than would improve or maintain navigation at that point, it seems to me. If it does contract, then it runs into the question of revenue, and we have no right to exact a revenue under the interstate-commerce clause.

Secretary GARFIELD. I see your point. There again, in each instance, it goes to the question of the determination of the facts as to what the amount of compensation should be, and whether it approaches——

Mr. HUBBARD. I asked the Secretary awhile ago to seek to justify that on the ground the revenue thus derived would be used by the Government for kindred purposes.

Secretary GARFIELD. The revenue would go into the general revenue funds of the Treasury, and there is no distinction in the fund after it gets there.

Mr. HUBBARD. That is, the ends would justify the means?

Secretary GARFIELD. No; I would not say that.

Mr. STEVENS. Do they, Mr. Secretary? Can we, by way of contract or by way of conditions requiring compensation, require a payment into the general fund of the Treasury to improve that stream, or some other stream somewhere else?

Secretary GARFIELD. I think we can; that is my individual belief.

Mr. STEVENS. Then you raise taxes.

Secretary GARFIELD. There again, it is not a tax that is levied generally upon property, but the result of a contract where the individual enters into a contract and says, "By reason of what is granted I am willing to pay so much money as a license." It is not an imposition by Congress, whether the individual agrees or not. He does as he pleases, and therefore it is not a tax.

Mr. STEVENS. Well, I differ with you there, Mr. Secretary, for this reason: These people own this property, they have a right to it. Congress, nor the State, nor anybody else, has any right to take it away from them.

Mr. HUBBARD. At that point, will you not define the right of the riparian owner, and his title to the use of those waters?

Mr. STEVENS. He has a right to use it in any other way provided it shall not interfere with navigation; second, that he shall not interfere with public use, nor of the persons above or below. Subject to those three things, the individual has the right to use that water in any way he sees fit.

Secretary GARFIELD. So far, then, if the individual is satisfied that he is not violating any of the three provisions you suggest, he may go ahead and construct this dam without coming to Congress or the Secretary of War?

Mr. STEVENS. Yes; I think the individual can construct this dam, and the Secretary of War could not touch it.

Secretary GARFIELD. Then there is nothing in that argument, because if the individual took that view of the case he would not be here.

Mr. STEVENS. Let us see just where that will lead you. In financing a proposition like this, people will not loan or advance money on a big proposition if there is any question about it. The people who advance money do not know about the physical topography there; they do not care whether it improves navigation or does not; they invest in the water power. We know as a matter of fact that it does not injure and may improve navigation, so that the questions affecting the Government are settled by that; but the United States now exacts as a condition of clearing the cloud from its title—a cloud which the United States casts itself—as a condition of the removing of that cloud, because that is all it is, have you a right to exact an undue compensation any more than an individual who has cast a cloud upon a title has a right to exact undue compensation?

Secretary GARFIELD. I should say certainly not undue compensation.

Mr. STEVENS. If you have no right to exact undue compensation, what is the compensation you have a right to exact?

Secretary GARFIELD. That would depend upon the facts in each individual case.

Mr. STEVENS. I agree with you there. Do not the facts in each individual case make the limit to what a Government can exact; and that is, the right to improve and conserve navigation under the interstate-commerce clause at that particular point?

Secretary GARFIELD. I am not clear on that whether he will not be limited to that point, as you indicate. My impression had been quite clearly that Congress would not be limited in the contract as to the particular point.

Mr. STEVENS. If you drift away from that you put money in the General Treasury to be used anywhere, not for river improvement, but to pay salaries and other uses.

Mr. HUBBARD. May I put the proposition in a little different way? You concede, as I understand it, that the right in these flowing waters to develop power is vested in the riparian owners. As a general proposition that is true even in the navigable streams?

Secretary GARFIELD. Ordinarily that is the law.

Mr. HUBBARD. How then is the Government entitled to compensation for that power? If it is worth $1,000 a year, is it in the power of the Government, as to something which does not affect navigation but which improves navigation, to say to that man or his grantee, "You shall not build this dam to develop this power unless you pay me $500 a year?" Can the Government do that?

Secretary GARFIELD. On that I think you put your question on the basis that it did not affect navigation.

Mr. HUBBARD. Certainly; the whole thing is based upon that. Is not the power of the Government confined to seeing that the navigable quality of the stream is not impaired?

Secretary GARFIELD. That is the basis.

Mr. HUBBARD. Then, starting with the supposition that the dam does not injure navigation—the evidence indicates that the construction of this dam will not affect navigation injuriously—and that the riparian owner is entitled to develop power from the head of water created by the dam he constructs, and it is worth $1,000 a year, can the Government come in and say, "This water shall not be used for this purpose unless you pay the Government $500 a year," thereby reducing the value of the right of that riparian owner from $1,000 a year to $500 a year?

Secretary GARFIELD. I should answer that in this way: If you determine that at the present time the construction does not injuriously affect navigation, then you could put the compensation down to a mere nominal sum and leave it open for determination in future years whether as the country develops that improvement becomes an obstruction to navigation. Congress thus reserves to itself the right to impose in later years a tax for its use.

Mr. HUBBARD. Oh, no; pardon me. Is not this the right of Congress: The right to remove what then has become an obstruction to navigation, a right which it originally had, tearing out, if necessary, the dam for that purpose?

Secretary GARFIELD. Or to improve it or require compensation from the person who in any measure obstructs. For example, Congress might later determine that it was necessary to build locks or

take some other action. In so doing we ought then to be able to say to this company:

We feel that this is an obstruction to navigation, therefore we reserve the right to impose upon you a charge to take care of this obstruction, and either construct the necessary locks or take such steps to restore the stream to proper condition at that point as may be necessary.

Therefore there should be this reservation in every one of the grants, either to impose compensation when the dam is built or at the time the facts warrant, and therefore there should be this clear recognition in the grant itself of the right to impose that character of compensation to be either immediately or ultimately given to the Federal Government when the facts require.

Mr. STEVENS. But under your argument do you not see, Mr. Secretary, that there is the limit that I have been pressing upon you?

Secretary GARFIELD. It may be that there is a practical limit.

Mr. STEVENS. Now just shift the point a little to the other objection that the President makes. You urge that a time limit be fixed. Now what practical benefit is a time limit on this project where these owners have a grant from Canada, where they own land in both States, and where under the law of Minnesota, and I think under the law of Ontario—but in Minnesota they own to low-water mark, own it so that they can dispose of it to that mark. Now of what use is it to the Government to fix a time limit for ninety-nine years except for the purpose of possibly affecting navigation some time in the future.

Secretary GARFIELD. That of course must be the basis.

Mr. STEVENS. If that same thing be effected in some other way, by means of giving the Department the right to remove that dam, or to cause the owners to remove it, or the right to construct locks, or cause the owners to construct locks, does not that accomplish the same thing?

Secretary GARFIELD. It may or may not. I think that ordinarily the safer way to conserve the interests of the public is to have a definite termination of the grant.

Mr. STEVENS. Well, now, the owner has some rights in this matter.

Secretary GARFIELD. Without doubt.

Mr. STEVENS. If the situation is such up there in the wilderness that a time limit is injurious or worse, if it is fatal to financing the proposition, and if the same thing can be accomplished by giving the Department the fullest authority to place upon the owner the expense of any change that will restore navigation or that will improve navigation, and at any time the War Department sees fit, is not that all that the Government has a right to exact?

Secretary GARFIELD. There is an opportunity for wide difference of opinion between both lawyers and engineers who have studied out this subject. I personally believe that in grants of this kind you can more effectually guard the interests of the public by limiting the time than by leaving it to provisions such as have been suggested.

Mr. STEVENS. I was not thinking of the interest of the public at this point, but just considering the interest of the owners from the other side in connection with the interests of the public.

Secretary GARFIELD. The interest of the owners should be considered to the extent especially that they should receive full and ample return for their investment and be given time long enough within

which they can earn for themselves a profit on what they have legitimately expended in the construction.

Mr. ESCH. Suppose a man should start in with the right of using these flowing waters for the creation of power, a right which no one else particularly shared in?

Secretary GARFIELD. That might occur, as you say.

Mr. ESCH. Why have you the right to limit his earnings or adjust his interest on the judgment of some body when he absolutely owns the whole thing, so long as he does not interfere with the navigation of the stream?

Secretary GARFIELD. That brings us back to the proposition we have hitherto been discussing, and that is the right to the water. Now, then, the Government steps in and in the exercise of its right——

Mr. ESCH. Of its right to do what?

Secretary GARFIELD. Its right there is to prevent obstruction to navigation. It imposes a condition under this contract. It says this structure which we permit you to erect may be an obstruction to navigation at this point at the end of the time limit, and at the end of that time we may have to take this thing up again. Within that period there should be a provision for the Government to take up the matter in case there should be an obstruction to navigation.

Mr. ESCH. Congress should withhold to itself the right to alter, amend, or repeal.

Mr. RICHARDSON. In this particular case the company owned a dam and owned the rights on both sides of the river. How could the Government sell the dam within twenty years without condemning the right, if in the meantime they spent $5,000,000 or $6,000,000 in paper plants and other things? What would their right be?

Mr. ESCH. That depends on what right the Government has.

Secretary GARFIELD. You get back to the same proposition.

Mr. STEVENS. That is why I wished to discuss this point. My proposition is this: The only interest the Government has is the right of navigation.

Secretary GARFIELD. The President desires that a time limit be fixed, so that the fullest right is given to the public authorities and to the people to protect that right of navigation as far as we can go; that we give the fullest right, so that at any moment, if a condition shall arise, navigation can be improved in any way that the Department sees fit; that the Department shall have a right to cause that dam to be taken out at the expense of the owner, or to be changed at the expense of the owner, or locks inserted at the expense of the owner.

Mr. STEVENS. Is that not as far as we can go; is that not all that is necessary?

Secretary GARFIELD. I think you have the right; it is a question of discretion as to how far you may exercise it. In connection with those conditions I think there should be in that a further clear definition of the right to exercise, or rather the power to exercise the right of imposing compensation, if it be determined at any time it be wise.

Mr. ESCH. But it frequently occurs where private waterworks are established to use the water of the river. Do you think that under any condition the Government could make any charge for the use of that water if it was not navigable water?

Secretary GARFIELD. Not if it does not affect navigation. That is the basis of any action the Government would take.

Mr. ESCH. Then if the Government has a right to go and put a charge on some enterprise where the Government has not spent a dollar, and does not own anything but navigation rights, how can you reconcile that charge?

Secretary GARFIELD. There it comes back to the same proposition. I think it makes no difference whether the Government builds the dam or gives the right to an individual.

Mr. STEVENS. I am giving you now simply my own idea. I do not think that under the laws of the country the Government owns anything in the world but the right of navigation, and the State owns the bed of the river, to hold that property subject to that one right. I believe a man has a right to go and put a projection in the river and that the Government has no right to remove it unless it interferes with the navigation of the stream.

Mr. CUSHMAN. And to take that question up at the date when it does become an obstruction to navigation.

Mr. ESCH. I believe further that where the Government has a stretch of navigable stream and wants to improve the navigation, I believe the Government can go to the man owning the projection and enter into a contract or an agreement with the party and say, "I will pay so much and you pay so much," because it is in the interest of the improvement of navigation. All the Government cares about is the improvement of navigation, so I think the Government has the right by cooperation and collaboration to make a contract and an agreement with the parties to the effect that they will let the parties use this water power, they to pay so much out of it, and at the same time the Government to improve the navigation. I believe that can be done constitutionally, by consent.

Mr. STEVENS. In all these dam bills we reserve the right to alter, amend, or repeal at any time. Would that limit, as suggested, not have a tendency to make a charge?

Secretary GARFIELD. I think it would, depending, of course, upon the length of time or the length of term of the right. The shorter the term the higher would have to be the charge in order to get back the principal.

Mr. STEVENS. The time limitation would result in increasing the charge to the consumer and in one sense it would be a taxation of the public for the use of the dam, with the easement therein. Do you think that would be beneficial in its tendency?

Secretary GARFIELD. I think that will be done anyway, because a company that builds a dam that is subject to removal upon the order of the Secretary of War in case it becomes an obstruction to navigation will necessarily make its charge high enough to insure itself against such action; and I do not think the imposition of a time limit would make any difference, therefore, upon the charge that would be made for that purpose. I think that they have got to get it ultimately out of the consumer, but of course if your time limit was very short they would raise the rate. If it is a long period, then they would exercise their discretion as to whether or not they think they would have to move it within that time limit, and if they did have to move it within that time limit they would increase their

charge to get back the principal before the time when they would have to remove the dam.

Mr. HUBBARD. Then this would be strictly a time limit instead of a time grant?

Secretary GARFIELD. It would be either one.

Mr. HUBBARD. You say if the riparian owner constructs this work he must give up his right at the end of twenty years. That is the language. He has the right to maintain it there for twenty years under your proposition.

Secretary GARFIELD. He would have it unless Congress reserved to itself the right to direct the removal.

Mr. HUBBARD. Whether Congress reserved that in terms or not, would not Congress have the power to make that river navigable at any time?

Secretary GARFIELD. I think it would.

Mr. HUBBARD. On that ground, can you give anybody rights for any specific term? Is it a mere license under which a man is to take a chance that he will be undisturbed?

Secretary GARFIELD. That is what it amounts to.

Mr. HUBBARD. Do you really think that a very large compensation would be proper to exact for a right, if you may call it such, of that kind?

Secretary GARFIELD. There again it would depend upon facts; it would be a question of business judgment. In a certain place a man would see that there would be an opportunity to get back money invested, and he would go into it, or if there was any probability of this being made a navigable stream he would not think of doing this thing.

Mr. HUBBARD. In other words, he would be practically a tenant at will, according to the judgment of Government engineers?

Secretary GARFIELD. That is what it amounts to now.

Mr. HUBBARD. You do not get revenue now and you would not get much then?

Secretary GARFIELD. I think so, ultimately. I think the compensation would be worth much before long.

Mr. HUBBARD. Such a structure as you are now talking of would create a head of water useful to irrigation?

Secretary GARFIELD. Without a doubt.

Mr. HUBBARD. In your judgment, could the Government sell the water for that purpose?

Secretary GARFIELD. I think so.

Mr. HUBBARD. Did not the Supreme Court indicate a very different opinion in the Colorado-Kansas case?

Secretary GARFIELD. You mean in this particular instance?

Mr. HUBBARD. In any instance. In any case where a dam is constructed and the Chief of Engineers signified that it would interfere with navigation, where water is created that can be used for irrigation, I understand you to say that the Government would have the right to sell that water.

Secretary GARFIELD. I think it would, if it did not interfere with the users of the water below.

Mr. HUBBARD. Exactly—if the stream is so full that the amount withdrawn would not interfere with navigation and not affect the rights of the parties below.

Secretary GARFIELD. I think so.

Mr. HUBBARD. In the Colorado-Kansas case did not the Supreme Court indicate clearly that the Government had nothing in the world to do with water for irrigation purposes except in lands owned by the Government?

Secretary GARFIELD. I do not read that case in that way. It is a long decision and there are a number of points involved there.

Mr. HUBBARD. Well, the United States sought to become an intervenor in that case on the theory that it had a right to deal with the irrigation of lands by waters derived from a stream along which the United States did not own the riparian rights, and the court said that it had no standing on that ground, which was the only basis on which they sought to stand.

Secretary GARFIELD. On the basis of facts they presented the settlers in another State below had not proven that there was such material injury to them in the use of the water as to justify the order.

Mr. HUBBARD. Between the two States, yes. But as to the attempt of intervention by the United States it went off, and the United States went out of court on the theory that it had no interest.

Secretary GARFIELD. That it had no land below there to irrigate.

Mr. HUBBARD. And for that reason had no right in the flowing water of that stream for that purpose or for any purpose, except for navigation.

Secretary GARFIELD. I beg your pardon—for that purpose, yes; but that does not touch the proposition that if the Government constructed the dam itself and there was surplus water over and above that which either it could use, or had not appropriated a part, it could sell that water for any purpose.

Mr. STEVENS. It did that as owner?

Secretary GARFIELD. Yes, sir.

Mr. HUBBARD. The United States builds a dam for navigation purposes and creates a surplus of water to be used for power or irrigation. How is the Government going to market that, not owning the adjoining lands?

Secretary GARFIELD. If it does not own the adjoining land there might be difficulty——

Mr. HUBBARD. But in the case we have before us, and in all these cases we are talking about, the Government is not the riparian owner and does not own the adjoining lands. How is it going to distribute this water, the head of which is gathered there; how is it going to distribute this power if developed? You can not distribute power simply by letting water run over a dam; you have got to have some machinery.

Secretary GARFIELD. Very true; you may allow an individual to erect a power plant there.

Mr. HUBBARD. If he owns or has title to the land on which he erects it; but how is the Government going to erect a United States structure on adjoining lands which it does not own? Has it power to condemn those lands for the purpose of developing and transmitting power?

Secretary GARFIELD. That is exactly what we are doing in irrigation plants.

Mr. HUBBARD. You are condemning?

Secretary GARFIELD. We are condemning land——

Mr. HUBBARD. For the purpose of doing what?

Secretary GARFIELD. Constructing whatever works may be necessary; in some instances constructing power plants and selling power.

Mr. HUBBARD. Do you think under the Constitution that the United States has power to appropriate private property for the purpose of creating power and selling it?

Secretary GARFIELD. As an incidental right to the work of reclamation which it is engaged in; yes; or in any other case it would be an incidental right to its development of navigation.

Mr. ESCH. Can you connect that with public use sufficient so as to warrant the condemning of private property?

Secretary GARFIELD. I think so.

Mr. HUBBARD. A public use which the United States has a right to make.

Mr. ESCH. Oh, yes; that is a condition precedent.

Mr. RICHARDSON. You are condemning one man's property to be used for another individual. That is the power the Government would be exercising in that instance.

Mr. STEVENS. Supposing we fix a time limit, say, of fifty years, and the law remains as it is now as to the obstruction of navigable streams. As I understand, the law to regulate the construction of dams across navigable streams has a penalty, if one does obstruct it, and a provision as to how the obstruction shall be removed. Am I right, General?

General MACKENZIE. Yes, sir.

Mr. STEVENS. Now, at the end of that time these people own that property in exactly the condition that they do now, and the law of obstruction remains as it is now, and the dam put in and used by them remains in good condition up to that hour, and at the end of that term of fifty years the owners of that dam come up to you, and you say we shall ask certain compensation and another time grant; and they say, "We have our dam in good condition; we have our property in good condition, and I think we will run it just exactly as it is." What can you do?

Secretary GARFIELD. That is the same question that has come up in a number of street railway cases where franchises had expired.

Mr. STEVENS. What can you do?

Secretary GARFIELD. I should say Congress or the Executive could do this; I think they could go in and require the removal.

Mr. STEVENS. Provided it actually obstructed navigation as a matter of fact?

Secretary GARFIELD. Yes.

Mr. STEVENS. Or they could go in under the terms of the contract itself——

Secretary GARFIELD. And to remove it itself.

Mr. RICHARDSON. Do you believe, after the Government has granted a license to a private corporation or otherwise to construct a dam, that those parties have to get any authority from the State at all?

Secretary GARFIELD. I do not know what the State law is; I do not know whether under the law of the State of Minnesota that would be necessary or not.

Mr. STEVENS. You do not know whether they could go there, for instance in Minnesota, and put up a dam without getting the consent of the State authorities of Minnesota?

Secretary GARFIELD. I have not looked that up; I do not know whether the State has attempted to exercise any right.

Mr. STEVENS. There is no question about the fact that they could not do it, recognizing the sovereignty of the State over the bed of the river.

Secretary GARFIELD. There are some of the States that do claim the right to so control the use of the water.

Mr. STEVENS. Not to interfere with navigation?

Secretary GARFIELD. I mean outside the question of navigation. I mean to charge for the use of the water. The State has a right to that.

Mr. STEVENS. If at the end of that fifty years that I have spoken about, no demand should be made for renewal, or no agreement be made for renewal, if the fact be shown that there was no obstruction to navigation as a matter of fact, and that it was an improvement as a matter of fact, then the United States would be helpless; they could not do anything, could they?

Secretary GARFIELD. I rather think the United States could. Take for example the condition existing to-day.

These gentlemen have expended a large sum of money, and, as shown by their plans and photographs, they have partially constructed this work. Supposing to-day Congress should decline to grant them any further extension.

Mr. HUBBARD. But what they are proposing to do would not injure navigation.

Secretary GARFIELD. If that would be the fact, then they do not have to come here at all.

Mr. HUBBARD. Could not they go on, if that is a fact?

Secretary GARFIELD. Yes; if it does not obstruct navigation.

Mr. ESCH. Does the question of this national boundary affect the matter?

Secretary GARFIELD. This has all been subject to that question, which I will bring up later.

Mr. STEVENS. Conceding this is an improvement of navigation and that they could go ahead without our consent, as I am inclined to think they could, and construct their dam, and we can not drive them out, yet you realize the fact we have to consider that the possibility of disturbing them constitutes a cloud over their right to be there—that we have a right to demand some payment; that is your position, is it not?

Secretary GARFIELD. They come here because they think they get something of real value in a grant from Congress, something that they can capitalize and dispose of and use for their benefit. They do not come here for the mere purpose of getting a bill passed that is of no value to them.

Mr. HUBBARD. That is, although it might not have any real value, if they can peddle it out to somebody else—that is the reason the United States exacts something from them?

Secretary GARFIELD. Oh, no; I do not put it on that basis. I say they do get something of real value. They would not come here unless they did get it.

Mr. HUBBARD. That something of real value is this, is it not, that there is the assurance from the officers of the United States that they have investigated this one question that the United States is concerned in—as to the interference with navigation—and that they have certified that navigation is not interfered with? Is that not the real value of it?

Secretary GARFIELD. They have certified that they have given them a grant which protects in the future all the rights of navigation that may be necessary in that stream. They do not certify that it is not navigable now or that it is not obstructed, but they do certify that for the time being they have permitted them to put an obstruction there which later may be removed if necessary.

Mr. HUBBARD. They would give that permit if the structure would obstruct navigation.

Secretary GARFIELD. They have often done it, and provided locks or other means for the protection of the existing navigation.

Mr. HUBBARD. It helps navigation instead of hurting it?

Secretary GARFIELD. Yes.

Mr. STEVENS. That is all provided for in this bill?

Secretary GARFIELD. That is all provided for in this bill.

Mr. BEDE. Suppose I own a lot in my home city and I want to put up an additional building. It is true that I have to get a permit from my city to put up the building. All they charge me is what will reimburse the city for the clerical force issuing the authority. I had to obtain the authority to put up the building and I had to pay a little something to get the permit, but the city did not attempt to charge me enough for that permit to divide with me the rental value of the building after I put it up.

Secretary GARFIELD. I think the simile is not quite on all fours. A building has to be constructed according to certain municipal regulations.

Mr. HUBBARD. Is not that an analogous situation—there he has to give the assurance that harm will not be done by falling or fire destruction of the building.

Secretary GARFIELD. It does not seem to me the situation is the same.

Mr. STEVENS. Has the State of Minnesota the right to exact a tax for the use of the water flowing over that dam?

Secretary GARFIELD. I do not know the laws of Minnesota.

Mr. STEVENS. The State of Minnesota owns the water so far as the public use of it is concerned; it belongs to the people of the State of Minnesota, subject to one limitation. Has not that State the right to exact a tax for the use of its property?

Secretary GARFIELD. Ordinarily.

Mr. HUBBARD. Do you mean that the State of Minnesota in this case is the riparian owner?

Mr. RICHARDSON. And that it can put anything into the same it pleases, subject to one limitation, that it does not interfere with navigation so far as the Government is concerned?

Secretary GARFIELD. I would not attempt to answer that, because I do not know the water laws of Minnesota.

Mr. STEVENS. If the State has a right to tax all property within its limits, and does so, then where the Government has no property

in that same water, has it the right to exact compensation for doing exactly what the State has already done?

Secretary GARFIELD. I should put it on a quite a different basis. I have no doubt the State of Minnesota could tax water-power companies or power development if they saw fit to do so; but I do not put this on the ground of taxation, but on the ground, as stated before, of a license based on a contract.

Mr. STEVENS. That is where we differ.

Mr. RICHARDSON. The compensation that you collect goes into the common fund of the Treasury, and that makes it a tax.

Secretary GARFIELD. Oh, no; there is a difference between a license fee and a tax.

Mr. STEVENS. Now, if you will proceed with the international side of this——

Mr. HUBBARD. Before we get to that, have not some of the Departments acted upon this?

Mr. ESCH. Yes; I think General Mackenzie will take that up. It will probably come more properly when he testifies.

Secretary GARFIELD. Just one other point, and that is on the question of the limit of time. My feeling has been very strong in regard to that, not only in regard to this special class of legislation but in others either in National or State affairs, of granting rights now which tie up in any way the future action of the people or of the Government. I simply throw that out as one of the main suggestions.

Mr. RICHARDSON. The Government is opposed to any policy of perpetuity.

Secretary GARFIELD. Yes, sir. Now, on the question of the international feature of this, I do not know whether the committee has given consideration to that side of it.

Mr. STEVENS. We have had nothing.

Secretary GARFIELD. The Rainy River and Lake are on the Canadian border, and any action by Congress that would affect the rights of Canada and the citizens of Canada might be in contravention of the Webster-Ashburton treaty. Whether it does or not I have not had the opportunity to investigate, but I think, if I may suggest, that it would be very wise to have this matter referred to the Department of State to the end that they might advise you whether or not there is anything in that treaty that would operate against any proposed action by Congress.

Mr. HUBBARD. Do you think of anything in it except the provision that these waters shall remain free to citizens——

Secretary GARFIELD. I have not had opportunity to give the matter full consideration. One thing occurs to me. The construction of this dam will necessarily back the water up in the lake, I am told today to the extent of 4 feet. Whether that will affect the Canadian rights I am not sure.

Mr. STEVENS. These gentlemen come here saying that they have full rights from the Canadian government.

Secretary GARFIELD. I had not gone into that.

Mr. RICHARDSON. If they have that, they are all right.

Mr. HUBBARD. But the question presented to me in connection with the international feature is this: If the United States can sell

power created by water backed up behind this dam, can not Canada do the same?

Secretary GARFIELD. I do not know what the Canadian laws are. If Canada has retained control of the river water to herself she could without doubt impose a charge for the use of the water. If her control is only over the question of navigation, then she might be limited the same as the United States is limited.

Mr. HUBBARD. You say the United States, although so limited, may sell this water for power purposes?

Secretary GARFIELD. No; I am afraid we are going back to the discussion of the other question.

Mr. HUBBARD. Say as to the general proposition—if Canada is limited in practically the same way, Canada can do the same thing?

Secretary GARFIELD. If limited as we are.

Mr. HUBBARD. The two governments could both be selling this water power?

Secretary GARFIELD. Both could impose conditions in the contracts.

Mr. HUBBARD. That means selling, does it not?

Secretary GARFIELD. I do not look at it that way; I do not put it on that basis.

Mr. HUBBARD. If the United States can make a charge that you are disposed to insist it may make, Canada may do exactly the same thing?

Secretary GARFIELD. If their laws are the same as ours.

Mr. HUBBARD. Assuming that.

Secretary GARFIELD. Yes.

Mr. HUBBARD. Then we have two governments exacting compensation for permission to do this thing.

Mr. STEVENS. The State of Minnesota does not want to be left out.

Secretary GARFIELD. That might be true, but I do not see that that would affect the question of right. That would be a question of good sound judgment and business ability for those gentlemen to consider who are seeking to make this improvement. If they have all their rights from Canada, then they know what they can do in that regard.

Mr. STEVENS. Do you know of any specific thing where treaty rights are infringed by this act?

Secretary GARFIELD. No; I do not. I have not had opportunity to give the matter any consideration. I simply spoke to the Secretary of State at Cabinet meeting this morning about the matter when it came up, and it was suggested that it ought to be very carefully investigated.

Mr. RICHARDSON. I think the Secretary's suggestion a very excellent one.

Mr. STEVENS. Would it not be wise—we have had the Vermillion (?) act here, and perhaps the Vermillion act ought to be submitted at the same time, so that the State Department can be fully advised.

Secretary GARFIELD. They ought to have all the facts before them, so that they will know what these gentlemen have done.

I wish to leave with your committee a copy of the report made by the War Department on Senate bill 500, which I think is commonly known as the inland waterways commission bill, or the Newlands bill. This is the last discussion from the War Department on the

general subject contained in the Newlands bill and which involves the question of charge and the general policy outlined there for doing the very thing we have been considering in this bill. I submit it for your consideration in connection with this matter.

Mr. STEVENS. It will be incorporated as a part of your remarks.

Secretary GARFIELD. If there is nothing further, I thank you very much for this opportunity.

Mr. STEVENS. We are under obligations to you, Mr. Secretary.

SECRETARY TAFT'S REPORT ON "NEWLANDS BILL" (S. 500).

WAR DEPARTMENT,
Washington, April 17, 1908.

Respectfully returned to the chairman of the Senate Committee on Commerce, inviting attention to specific suggestions as follows:

1. Certain provisions of this bill (S. 500, Sixtieth Congress, first session) are in accord with the suggestion of an inland waterways commission appointed by the President on March 14, 1907, of a plan for obtaining information concerning our waterways as related to the general welfare. The policies and general plans of this commission were submitted to the President on February 3 last in the form of a preliminary report, which report was transmitted to the Congress on February 26 with a message approving the recommendations.

2. The bill carries the following provisions which render it worthy of careful attention:

(*a*) It provides for coordination between navigation and other uses of the waters in connection with their improvement for the promotion of commerce among the States. This provision is fully explained in the preliminary report of the waterways commission. It is recognized by the War Department as wise and necessary.

(*b*) The bill provides for cooperation with States, municipalities, communities, corporations, and individuals. This provision seems to be based on the constantly increasing utilization of the streams, not only for navigation but for other purposes, which has accompanied extension of settlement and increase of population. With sparse settlement, largely confined along waterways, there was little overlapping or conflict of interests connected with the running waters; but with the present comparatively dense population not only all uses of the streams but all conflicting interests must be brought into harmony in order that the waterways may be made generally beneficial. This can not be done without careful regard for the interests of all the people, and for all the lawful means that may be employed to protect them. The aim appears to be that of promoting union of interest through mutually beneficial cooperation, and thus meeting the requirements of our growing population and increasing industries. This feature is recognized by the War Department as highly desirable.

(*c*) The bill provides for correlating the existing agencies in the Departments of War, Interior, Agriculture, and Commerce and Labor through certain powers vested in the President. The need for some such plan is sufficiently shown by the fact that, while this country is better endowed with waterways than any other, our streams are less

used for navigation and other public purposes than those of other countries. Since this provision touches duties placed on the War Department by law, it has received careful consideration. It does not appear that the measure would interfere with the functions of the War Department, or with the continuation and extension of the engineering work now performed there, but it is believed that the provision for administration would tend to promote the general welfare; accordingly this feature meets the approbation of the War Department.

(*d*) The bill provides for the utilization and control of water power available in navigable and source streams developed by works for improving navigation. Under statutory provisions for the granting of rights connected with navigable streams, which have been often repeated and sustained by the courts, the War Department has exercised the power to regulate the use of the water of navigable streams for power purposes developed incidentally by improvements intended to promote navigation. It is the policy of the Department to extend such control and thereby protect the public interests by limitation of the term and manner of use of leases, by reasonable charges for the benefits conferred, and by any other means found requisite from time to time. A continuation of such control is essential to the policy of coordination and cooperation made necessary by the conditions that have arisen with the growth of population and increase of industries. Accordingly, this feature of the measure is regarded as in accordance both with established custom and with current needs.

(*e*) The bill provides also for the initiation of projects by a board of experts. These provisions affect the work of the War Department, and have had careful consideration. Suitable provisions for expert initiation and prompt execution are essential to the proper development of any system of river improvement. The chief defect in the methods hitherto pursued lies in the absence of executive authority for originating comprehensive plans covering the country or natural divisions thereof. The creation of an inland waterways commission for the purpose of initiating plans for the improvement of waterways seems to me a more effective way of a general plan for the improvement of all the waterways in the country than under the present provisions of law. This would not dispense with the admirable machinery furnished by the War Department for the improvement of waterways when the plan has been determined upon and is to be executed. But it supplies what does not exist in the law now—a tribunal other than Congress charged with the duty of originating and developing a satisfactory plan.

(*f*) The present bill confers very great powers upon the commission to be appointed, because it provides the money with which this commission may execute the plans which it adopts. How far, if at all, this great power should be limited, this Department expresses no opinion.

(*g*) In connection with the method of administration provided for, the bill makes proper provision for guarding expenditures and reporting operations.

3. In its present form the bill might be construed to curtail indirectly certain functions of the War Department, which is now charged with large discretion in waterway affairs. Possible ambiguity on this point should be removed. The present arrangement began with

the creation of the War Department when the Federal Government was organized in 1789; it was not changed when the Navy Department was instituted nine years later, or when the civilian Department of the Interior was established in 1849; and the records pertaining to the administration of the waterways are kept in the War Department, in the custody of the Chief of Engineers of the Army. Under the same long-standing arrangement it is the policy of the War Department to maintain a trained body of military engineers with a view to the national defense, and to keep these engineers in training in time of peace by detail to civil duty allied to their professional duty in time of war or military preparation; and it was in carrying out this policy that the functions of the War Department pertaining to waterways have been more and more largely intrusted to the engineers of the Army during the one hundred and ten years since the Army and Navy were separated in distinct Departments. This policy has long been sustained by the Congress, although the military engineers have been prohibited from initiating projects or originating plans for meeting the growing needs of commerce.

It is desirable to continue the policy of keeping the military engineers in training and at the same time rendering their skilled service available in work on waterways, although it is not necessary to vest them with the power of initiative, which they have not exercised in the past and which is perhaps inconsistent with their primary duty in conection with the military establishment of which they form a part. A provision that the Chief of Engineers of the Army shall be a member of the commission proposed to be created, and a further provision specifically covering the detail of military engineers to the service of the commission whenever such detail shall be consistent with their military duties, would remove any possible ambiguity and would be in accord with the custom and policy of the War Department.

4. I respectfully suggest certain changes in the form of the bill, to meet constitutional and legal objections which have occurred to me. These relate to (*a*) the general authority of Congress over inland waterways in connection with navigation; (*b*) the specific authority over collateral works for purposes incidental to the improvement of navigation; (*c*) the reservation to the Government of the control over such collateral works now conferred upon it by law.

(a) The constitutional power of Congress over inland waterways extends to the regulation and improvement of navigation as an incident to the power to regulate interstate and foreign commerce. In order to make it clear that the bill contemplates no further extension of the Federal authority beyond these limits, I would suggest the following changes:

Section 1, page 1, line 6, before the words "inland waterways" insert the word "navigable;" for the word "county" substitute the words "United States for the purpose of regulating, improving, and protecting interstate and foreign commerce," so as to make the passage read:

the development of the navigable inland waterways of the United States for the purpose of regulating, improving, and protecting interstate and foreign commerce.

Same page, line 11, before the words "inland waterways" insert the word "navigable," so as to make the passage read:

the development of the navigable inland waterways of the country.

Page 2, lines 9 and 10, for the word "transportation" substitute the words "interstate and foreign commerce," so as to make the passage read:

with a view to the promotion of interstate and foreign commerce.

Page 2, line 14, strike out the words "regulation and;" also at the end of the same line insert the words "for the better regulation and protection of interstate and foreign commerce," so as to make the passage read:

transfer facilities and sites and the control thereof for the better regulation and protection of interstate and foreign commerce.

Page 4, line 27, after the word "desirable," insert the words "for the better regulation, protection, and development of interstate and foreign commerce," so as to make the passage read:

the improvement or construction of an inland waterway or coastal waterway is practicable or desirable for the regulation, protection, and development of interstate or foreign commerce.

(*b*) In the execution of any project and as incidental to and inseparably connected with the improvement of navigation, the power of Congress extends to the regulation of the use and development of the waters for purposes subsidiary to navigation. In order to avoid any appearance of further extension of Federal authority, I suggest the following changes:

Page 2, line 10, after the word "and," insert the words "in connection therewith and in aid thereof," so as to make the passage read:

and in connection therewith and in aid thereof to consider and coordinate the questions of irrigation, etc.

Page 4, line 13, after the words "advisable in," insert the words "aid of and in," so as to make the passage read:

as may be deemed advisable in aid of and in connection with the development of a channel for navigation, etc.

(*c*) In order to reserve to the Government the power now conferred upon this Department by law in connection with the construction of dams in navigable waters, I suggest that after the word "President" and before the words "to enter into cooperation," in line 18, on page 4, the following words be inserted: "and under such regulations and conditions as he may prescribe for the protection of the present and future interests of the Government and people of the United States," so as to make the passage read:

That such Commission is authorized, with the approval of the President and under such regulations and conditions as he may prescribe for the protection of the present and future interests of the Government and people of the United States, to enter into cooperation with States, municipalities, communities, corporations, and individuals in such collateral works, etc.

(*d*) I also suggest the following minor changes to meet miscellaneous legal objections:

Page 3, line 3, after the words "in addition to any other compensation received from the United States," amend so as to make the passage read:

and to fix the salaries, in addition to any other compensation received from the United States, of all commissioners, etc.

Page 3, line 19, after the words "cause to be" and before the word "provided," insert the words "leased or otherwise;" and at the beginning of line 21 on the same page, before the words "as may," insert the words "in the District of Columbia and elsewhere," so as to make the passage read:

The President shall cause to be leased or otherwise provided for the use of the commissioners and other employees under this act, such offices in the District of Columbia and elsewhere, as may, etc.

Page 5, line 1, after the words "collateral works" and before the words "shall be paid," insert the words "to be paid by the United States," so as to make the passage read:

That the cost of such collateral works to be paid by the United States shall be paid, etc.

WM. H. TAFT,
Secretary of War.

STATEMENT OF GEN. ALEXANDER MACKENZIE, CHIEF OF ENGINEERS, U. S. ARMY.

Mr. STEVENS. You have various reports concerning this Rainy River project?

General MACKENZIE. Yes, sir; we have. Of course the matter as it has come to us has been in connection with the original and various other bills which were referred to our office by Congress for report, and about which we reported.

Mr. STEVENS. Have you copies of those reports that you could refer us to, so that we could make them a matter of record—all of the reports from the beginning?

General MACKENZIE. I have a reference to them.

Mr. STEVENS. We would like the record to be made complete.

Mr. HUBBARD. You need not take time to get them now. If you will refer to them later or see that we get them, it will be all right.

General MACKENZIE. They are comparatively brief in each case. Our office considers these matters mainly in their relation to navigation and examines the wording of the bill to see if it is such as to protect the interests of navigation, calling attention to any other matter which possibly the Secretary of War might desire to give consideration to.

Mr. STEVENS. Then will you furnish the committee with a copy of all the reports from the beginning, so that it can go into the record as a part of your statement?

General MACKENZIE. Yes, sir.

Mr. STEVENS. What information has your office concerning the navigability of the river at that point or the obstruction that actually would be made by this dam at the point where it is to be located?

General MACKENZIE. The information which I have is not from personal knowledge, but I understand that the only navigation possible at this point is what might be called a downstream navigation for logs or something which might float down the stream.

Mr. STEVENS. Do you know anything about the history of navigation at that point?

General MACKENZIE. Only in a general way, that a great many years ago there was a canal commenced by the Canadian government,

which I believe was never finished, but I do not know any of the details.

Mr. STEVENS. That is substantially the statement that is made in the report by the secretary of the company, who testified to the same fact.

General MACKENZIE. Yes.

Mr. STEVENS. Has your department made any survey or project for improvement at that point?

General MACKENZIE. No, sir; we never have.

Mr. STEVENS. Now, General, I call your attention to Public Act No. 262, to regulate the construction of dams across navigable water with the proviso to section 1:

that in approving said plans and location such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that such person shall construct, maintain, and operate, without expense to the United States, in connection with said dam and appurtenant works, a lock or locks, booms, sluices, or any other structures which the Secretary of War and the Chief of Engineers at any time may deem necessary in the interest of navigation, in accordance with such plans as they may approve.

Now, do you consider that as authorizing you to require that whenever the exigencies of navigation shall require, whenever any changes may be necessary in the way of navigation, or anything like that, that you have a right to compel the owners of this dam, erected under such conditions, to make these changes indicated in this proviso?

General MACKENZIE. Yes, we would consider that we had that right as a rule; but whether it applies in this special case of the Rainy River dam I would question, such dam being built under a special act, previous to the passage of the general act. That would be a matter to be considered.

Mr. STEVENS. The act which was actually passed and which was vetoed provided that all of the conditions, provisions, and restrictions provided in this act should remain a part of the act that is under consideration.

General MACKENZIE. That would bring it, of course, under all those conditions.

Mr. STEVENS. If that be true, then would it not be a fact that whatever changes would occur in the navigability or in the necessities of navigation, that the War Department or the Chief of Engineers would have authority to compel that dam to be changed?

General MACKENZIE. So we understand the conditions of the law.

Mr. STEVENS. And this would all be done at the expense of the owners of the dam?

General MACKENZIE. Yes, sir.

Mr. STEVENS. And not at the expense of the United States?

General MACKENZIE. In the matter of the construction of a lock at this point, that is questionable. I imagine that, possibly, if the Government ever concluded to improve that river it would probably be just and equitable for the Government to appropriate for the construction of a lock.

Mr. STEVENS. Has there ever been tendered to your Department by the owners or projectors of this dam, land or property upon which the Government might construct a lock?

General MACKENZIE. It has been tendered, but as yet not absolutely accepted; the deed has not passed; but it is a part of the tender and a part of the conditions under which new and extended plans which they propose to use would be approved.

Mr. ESCH. In that connection, where a dam is constructed over a navigable stream, has the Government a right to exact the construction of a lock at the expense of the constructors or the owners of this dam?

General MACKENZIE. That would be a matter of the law under which it is constructed. The general policy, I think, has been that wherever there was navigation of some kind or description and a dam was to be built the plan should include a lock.

Mr. STEVENS. Do you not go further? Do you not go to the extent that wherever there is a right of navigation or a right of improvement by Congress or the Federal Government, that at such place you have the right to exact such a charge as shall overcome whatever injury those persons do at that place in constructing their works?

General MACKENZIE. It would probably be within the right of the general law to do it.

Mr. HUBBARD. Let me ask whether the course suggested by Mr. Stevens has not, however, been followed in many instances?

General MACKENZIE. There are a number of acts authorizing dams on the upper Mississippi, where there was no navigation, in which it is provided that in case in the future it is desired by the Government to make that portion of the stream navigable the company will give the Government the property on which to build the lock. Wherever a case has come up in which there was even a theoretical navigation which would be destroyed by the building of a dam, it has been considered as proper to require a lock as a part of the original plan.

Mr. STEVENS. Did you ever consider that as a part of the original plan there were conditions for your approval that it might become necessary to remove the dam as an obstruction, and that in such case provision should be made toward any possible expense in that contingency?

General MACKENZIE. There are several dam acts in which it is provided, and it is in this very Rainy River act, that Congress reserves the right, in case it desires in the future to control the dam, to take possession of the dam at its cost. Under the general dam act the Government has the right to cause the removal of a dam if it becomes a serious obstruction or if the laws under which it is built are not fully observed.

Mr. STEVENS. When an obstruction does actually exist in a navigable stream under the law as it stands, what have you the right to do?

General MACKENZIE. That would depend of course upon the special law under which a work is built. In the case of any dam which is not built in accordance with the law which gives it a right to stay there we would consider that the Secretary of War had the right to order its removal or that it be changed in such a way as to remove the obstruction.

Mr. STEVENS. Supposing it was a theoretical obstruction and not a practical obstruction to navigation, what right would you have?

General MACKENZIE. In such a case the matter would undoubtedly be carried into court, and probably the court would determine the matter.

Mr. ESCH. It would be a question of fact?

General MACKENZIE. Yes, sir; it would be a question of fact.

Mr. STEVENS. That is what I wanted to get at.

General MACKENZIE. In the case of the Union Bridge they disputed the right of the Secretary of War to order the removal, but the court sustained the Secretary of War.

Mr. STEVENS. Was that the Pittsburg bridge?

General MACKENZIE. Yes, sir. We have had other cases brought into court where they refused to obey the order.

Mr. STEVENS. But it depends upon the fact at the time?

General MACKENZIE. Yes, sir.

Mr. STEVENS. Have you in your office any statement or report or part of report pertaining to the history or the legal course of your Department in matters of this sort?

General MACKENZIE. We have, in the form of a circular which was issued under date of April 4, 1905, in connection with a bridge act which was referred to our office for report. Having had a number of such bills, the matter was gone into with considerable care and a report submitted to Mr. Taft, as Secretary of War, giving the views of our office as to the laws governing water-power questions. If I mistake not, it was referred also to the Judge-Advocate-General.

Mr. STEVENS. Will you leave a copy of that, to be inserted as a part of your report?

General MACKENZIE. Yes, sir.

Mr. ESCH. Was that the report made on Judge Richardson's bill?

General MACKENZIE. I think it was some time before Judge Richardson's bill. The report went to the Secretary of War and he expressed his approval of the conclusions presented, and this report has been, up to very recently, a guide to us in dealing with water-power subjects.

Mr. RICHARDSON. Here is about the substance of it, is it not, General?

In connection with legislation of this kind careful consideration should be given to the question of the limitations of the power of the Federal Government over navigable waters. By virtue of its power to regulate commerce, Congress may exercise control over the navigable waters of the United States, but only to the extent necessary to protect, preserve, and improve free navigation. The Federal Government has no possessory title to the water flowing in navigable streams, nor to the land comprising their beds and shores, and hence Congress can grant no absolute authority to any one to use and occupy such water and land for manufacturing and industrial purposes. The establishment, regulation, and control of manufacturing and industrial enterprises, as well as other matters pertaining to the comfort, convenience, and prosperity of the people, come within the powers of the States, and the Supreme Court of the United States holds that the authority of a State over navigable waters within its borders, and the shores and beds thereof, is plenary, subject only to such action as Congress may take in the execution of its powers under the Constitution to regulate commerce among the several States.

That has governed the policy of your Department?

General MACKENZIE. Yes, sir; that is the policy so far as to the right of the Government as an owner. As to other questions of return to the Government, we are governed by higher authorities.

Mr. HUBBARD. Still, I am sure, Congress would be glad to have the benefit of your views on those very questions. Your experience and judgment on those would be very valuable, and I hope you will not hesitate to express them.

General MACKENZIE. We try to hold ourselves as a rule simply to the questions of engineering and navigation, and while we did apparently in the one case take in account the legal side of this question, we considered such report as simply a collection of what we understood to be the laws in the case. In all reports upon bridge acts we aim to simply cover the question of navigation.

Mr. RICHARDSON. Based on the idea that the Government has no control of anything but navigation?

General MACKENZIE. That is our understanding of the law.

Mr. RICHARDSON. And if something does not obstruct navigation, put there by an individual or by a private corporation, the Government has no right to interfere as long as it does not obstruct navigation.

General MACKENZIE. My general thought in connection with the reference to the War Department of these matters, in such a case as this especially, has been to determine whether the work which is to go in will obstruct navigation or not. The law prohibits the obstruction of navigation without specific authority of Congress. Now, Congress grants a certain right, and it also provides that the plans shall be acted upon by the Chief of Engineers and the Secretary of War; and the understanding in our office is that the object of having those plans brought to the Chief of Engineers and the Secretary of War is to determine whether they really will obstruct navigation to any greater extent, at least, than the authority of Congress may permit.

Mr. RICHARDSON. It is a very convenient and quick way of determining, by report of one party to a transaction, a question that otherwise might be brought before the court.

General MACKENZIE. Yes, sir.

Mr. ESCH. There are numerous instances, are there not, where bridges or dams are built over navigable waters that are wholly within a State, where no right is asked of Congress to build that bridge or dam, but you merely pass upon the plans and specifications?

General MACKENZIE. Yes, sir; that is, in all cases where the navigable waters concerned lie in one State.

Mr. ESCH. That practice would clearly imply that you were only looking to the navigability of the streams; is that it?

General MACKENZIE. That is all.

Mr. HUBBARD. Let me ask whether such action is taken under any general statute.

General MACKENZIE. Yes, sir; section 9 of the river and harbor act of 1899 provides that it shall be

> unlawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced.

Mr. RICHARDSON. Still, that would have to be permitted to you to see that it did not obstruct navigation?

General MACKENZIE. Yes, sir; that is the object, we suppose, of the law.

Mr. RICHARDSON. Is it not a fact that the Government has right and authority over the navigation of an intrastate stream?

General MACKENZIE. Yes, sir.

Mr. RICHARDSON. Different from interstate in a great many respects?

General MACKENZIE. Yes, sir.

Mr. HUBBARD. Then I understand in the inquiry presented to you the nature of your response is the same, whether it relates to works in intrastate or interstate?

General MACKENZIE. Yes, sir; as regards protection of interests of navigation.

Mr. RICHARDSON. Is it not a fact that the jurisdiction which Congress has over navigable streams is in general conditions different from interstate commerce; that the Government has jurisdiction over a navigable stream that is entirely within one State?

General MACKENZIE. It has, so far as navigation is concerned.

Mr. RICHARDSON. So far as the Constitution goes in reference to navigable waters, it is a different jurisdiction than given otherwise by interstate commerce?

General MACKENZIE. Yes, sir.

Mr. STEVENS. Has the plan for this dam been before your office?

General MACKENZIE. Yes, sir. The plans which were presented originally were somewhat general in their nature, simply giving in a general way the proposed works and their location.

Mr. STEVENS. Have those plans been approved by your office?

General MACKENZIE. Yes, sir; the plans were approved.

Mr. STEVENS. And the basis of your approval was that they did not interfere with navigation at that point?

General MACKENZIE. Yes, sir.

Mr. STEVENS. Has that condition been changed since the date of approval, if you know?

General MACKENZIE. No, sir; not that I know. I have no information that would indicate that they have.

Mr. STEVENS. If the facts then show in your office that those plans were approved, that the conditions are the same, and the dam is not finished within the time provided by law—that is, the first of July or whatever it may be—what rights would your office have as to the dam? In other words, if the records in your office show it is not an obstruction to navigation as a matter of fact, and the dam is not finished, or is partially finished, outside of the time allowed by the law, what right would you have?

General MACKENZIE. Our only rights, and course of action, in a case of that kind would be under the law simply to report the matter to the Department of Justice. That would be the only course we have.

Mr. STEVENS. You would have no rights yourself to go and tear down the structure?

General MACKENZIE. No, sir.

Mr. STEVENS. Do you, or the Department, proceed on the theory that it was in fact an obstruction to a navigable stream?

General MACKENZIE. If they so find, yes, sir. Otherwise only a technical violation of the law.

Mr. RICHARDSON. I understood you to say just now, in answer to a question from Mr. Stevens, that there was a plan on hand by which ground had been offered, and that a lock was contemplated being built there.

General MACKENZIE. The proposition is that their work shall be so built that it will be possible for the Government, in case it ever desires to build a lock on the American side of the river, to do so.

Mr. RICHARDSON. Was it contemplated that the Government would pay the expenses of the lock, or that the company would do so?

General MACKENZIE. The original act did not provide as to who should build it; but I would say frankly it was the assumption of our office that the Government would build it.

Mr. RICHARDSON. Because it improved navigation?

General MACKENZIE. Because it improved navigation. There is no navigation now, so they are not destroying it.

Mr. HUBBARD. The construction of the dam, according to your view, would be a help to that project?

General MACKENZIE. Yes, sir. I might say that the original plan provided sluiceways for logs.

Mr. STEVENS. If the general dam act should be made a part of this bill, as it is, and your office some time in the future should conceive it might be necessary to construct a lock as part of that dam, under the provisions of that act you would have the right to compel the company to do it, if you saw fit?

General MACKENZIE. Yes, sir; I think under the wording of that general act we would have the right to compel them to do it.

Mr. STEVENS. To make any sort of improvements that might be necessary, as part of that structure?

General MACKENZIE. Yes, sir; we might not think it equitable to do it, but we would have the right.

Mr. STEVENS. Have you examined these photographs, or do you know anything about them?

General MACKENZIE. I looked over them as I came in.

Mr. STEVENS. Do you know whether or not they show the true condition of affairs there?

General MACKENZIE. I have no doubt they do. I have not been there.

Mr. STEVENS. You have no information to the contrary?

General MACKENZIE. No, sir.

Mr. STEVENS. Have you any other statement concerning the history or the law of these water rights in your office, or in your own control as a member of the Inland Waterways Commission?

General MACKENZIE. I have a little memorandum which was prepared in the office, which has never been made any use of, but which simply was the office view—a sort of collection of certain Supreme Court decisions and others upon this question.

Mr. STEVENS. Have you any objection to our making it a part of our record?

General MACKENZIE. No, sir; not any.

It suggests itself to me to say that we anticipate new plans being presented in connection with this Rainy River work, in which they may desire possibly to raise the dam a little. Those plans have not yet come. The work they are doing is still based on the original plan. When the new plans are presented the matter of the lock [illegible] its location will be more definitely fixed.

Mr. RICHARDSON. In connection with the location of that lock and the building of it and the paying for it by the Government, if the time ever comes that the private corporation having already paid for the dam, and having paid all expenses, and the Government coming along and recognizing that navigation will be improved by putting the lock in there, has the Government ever contemplated in such a contingency as that making the parties pay the additional charges?

General MACKENZIE. I could hardly say what is contemplated. If left to our office our conclusion would probably be that if the Government wanted a lock, it should pay for it.

Mr. RICHARDSON. Because the water-power company has no interest in navigation, and the Government does have an interest in navigation, and that if it is to be benefited by it that it ought to pay for it.

General MACKENZIE. You take the general dam act. While it does make reference to the right of the Secretary of War to require provision for locks in the plans, it also makes provision that if the Government ever does desire to put a lock in the party shall give the Government the ground on which to put the lock.

Mr. STEVENS. You have had general experience concerning waterways of the upper Mississippi Valley. Has there ever been called to your attention section 2 of the enabling act of the State of Minnesota, passed by Congress in 1857, which is included as section 2, article 1, in the constitution of the State of Minnesota, and which reads as follows:

And be it further enacted, That the said State of Minnesota shall have concurrent jurisdiction of the Mississippi and of other rivers and waters bordering on said State of Minnesota so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same, and said river and waters, and the navigable waters leading into the same, shall be common highways and forever free as well to the inhabitants of said State as to the other citizens of the United States, without any tax, duty, impost, or toll therefor.

General MACKENZIE. I do not know that it has; but it is my impression that I knew of that condition.

Mr. HUBBARD. I find at the end of section 1 of this general act a phrase that to my mind has some significance, and I would like to ask your opinion of that phrase—

And also that whenever Congress shall authorize the construction of a lock, or other structures for navigation purposes, in connection with such dam, the person owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States a free use of water power for building and operating such constructions.

This seems to be something in the nature of an admission that the ownership of that power is not in the United States, but is in the owner of the dam.

General MACKENZIE. That is what we understand. However, while the Government may not have an ownership in the works or the power, it may not be unreasonable to require the furnishing of a little power for operating if the Government puts in a lock, although it may be somewhat in the nature of a tax.

Mr. RICHARDSON. Minnesota simply took the precaution that some States did not take; she inserted her constitutional powers in her enabling act.

CIRCULAR, No. 14.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, April 4, 1905.

The following report on a bill introduced and considered at the third session of the Fifty-eighth Congress is published for the information of officers of the Corps of Engineers in charge of river and harbor works, it being thought that the important legal propositions discussed, and a knowledge of the Department's position regarding the subject-matter, may be of interest and value:

WAR DEPARTMENT,
January 17, 1905.

Respectfully returned to the chairman Committee on Interstate and Foreign Commerce, House of Representatives, inviting attention to the accompanying report of the Chief of Engineers, U. S. Army, of yesterday's date, and to drafts of bills therein referred to. The report seems to me to be very comprehensive, accurate, and instructive.

WM. H. TAFT, *Secretary of War.*

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, January 16, 1905.

Hon. WM. H. TAFT, *Secretary of War.*

SIR: 1. I have the honor to return herewith a letter, dated the 13th ultimo, from the Committee on Interstate and Foreign Commerce of the House of Representatives, inclosing, for the views of the War Department thereon, H. R. 16298, Fifty-eighth Congress, third session—

"A bill to provide for and regulate the use of the navigable rivers and streams of the United States for manufacturing, industrial, and other purposes by means of water power obtained therefrom."

2. There are two distinct propositions embraced in the bill, as follows:

(*a*) To authorize the Secretary of War to grant leases and licenses to private persons or corporations for the use of water power created by dams and other structures built by the Government on navigable waters for the benefit of navigation.

(*b*) To empower the Secretary of War to authorize private persons or corporations to construct dams and other structures, and to develop and use water power, at points on navigable rivers where the Government has not built such structures.

3. In connection with legislation of this kind careful consideration should be given to the question of the limitations of the power of the Federal Government over navigable waters. By virtue of its power to regulate commerce, Congress may exercise control over the navigable waters of the United States, but only to the extent necessary to protect, preserve, and improve free navigation. The Federal Government has no possessory title to the water flowing in navigable streams, nor to the land comprising their beds and shores, and hence Congress can grant no absolute authority to anyone to use and occupy such water and land for manufacturing and industrial purposes. The establishment, regulation, and control of manufacturing and industrial enterprises, as well as other matters pertaining to the comfort, convenience, and prosperity of the people, come within the powers of the States, and the Supreme Court of the United States holds that the authority of a State over navigable waters within its borders, and the shores and beds thereof, is plenary, subject only to such action as Congress may take in the execution of its powers under the Constitution to regulate commerce among the several States.

4. Many of the provisions of the bill under consideration appear to conflict with these principles of law, and particularly sections 3 and 6, which propose to confer upon the United States, and upon any lessee or grantee under the provisions of the bill, the power to condemn any land or other property bordering on or adjacent to the river or stream to be used. Eminent domain is the right to take property for public uses, and is inherent in the United States by virtue of its sovereignty. Private property can be expropriated by the Federal Government, however, for public purposes only; that is, when it is necessary for the use of the Government in the exercise of any of its legitimate powers. To take or to authorize the taking of the property of one individual for the use and benefit of another in carrying on a private business or industry, as proposed by the bill, is not a proper exercise of the right of eminent domain. There may be certain enterprises of a quasi-public character, such as electric light and

railway companies, that would desire to avail themselves of the use of water power, and to which the right to condemn private property could properly be granted; but the granting of such right is believed to be a function of the States, inasmuch as the organization and incorporation of these enterprises, as well as the title and ownership of the property affected, are matters for State control and regulation. In view of the foregoing, I am unable to recommend favorable consideration of the bill in its present form.

5. To legislation authorizing the Secretary of War to lease water power created by works constructed by the Government, I see no special objection, but I know of no demand for it in the public interest. The right of Congress to regulate, control, and dispose of such water power is believed to be unquestionable, inasmuch as the power constitutes a valuable property created at the public expense, and when utilized by private persons or corporations should be paid for. Whether a general policy of this kind should be adopted, however, is a question that should be very carefully considered. Locks and dams are built and operated for the purpose of facilitating navigation and commerce, and nothing should be permitted that would tend to impair their usefulness, or interfere with their operation for this purpose. Partnerships or quasi partnerships between the Government and private persons or corporations have not been generally favored in the past, as experience has shown that they are apt to be attended by many annoying complications. I do not believe that sufficient revenue would be derived from renting water power to compensate for the trouble and inconvenience that might ensue from the adoption of such a policy. Congress has heretofore authorized the renting of land and water power at the locks and dams on the Muskingum River and Green and Barren rivers; but it is understood that this was done for the reason that at the time these works came into the possession of the United States there was in existence a number of leases granted by the former owners which constituted an easement on the property, some of which leases had many years to run. In cases where a new privilege is asked, it has been customary to invite public competition, setting a minimum price; but no active competition has been developed. There is also one company which uses land and water power at Lock No. 4 on the Kentucky River, under a lease granted by the State of Kentucky, which expires in 1977. During the past fiscal year there were in existence 27 different leases, and the total gross revenue received by the Government was only $4,500, and in a number of instances in the past the Government has been compelled to resort to suits against lessees to collect the rental. While many applications would be made for permission to use Government water power, if no charge was made therefor, it is believed that few leases would be made, and then only at favored localities, if adequate compensation were exacted. In the river and harbor act of June 13, 1902, Congress authorized the leasing of water power at the locks and dams on the Cumberland River. Before the enactment of this law a number of persons appeared to be desirous of using water power in this river, but although the law has been in existence more than two years not a single lease has been applied for or granted. If, however, Congress should decide to adopt this policy, I beg to recommend that the legislation take the form of the accompanying draft of a bill which, in my opinion, is so drawn as amply to protect the interests of the Government.

6. Regarding the proposition to empower the Secretary of War to authorize the use and development of water power at localities not improved by the United States, it should be borne in mind that natural water power, that is, power made available by the existence of natural falls and rapids in a river is appurtenant to riparian ownership, and the right to use it is governed by State laws on the subject of private property. As above set forth, the Federal Government can regulate and control it only to such extent as may be necessary in the interest of navigation. Sections 9 and 10 of the river and harbor act of March 3, 1899, cover cases of this kind, and under this law the interests of the Government can, in my opinion, be better protected than by a law general in its scope, as contemplated by the bill. I do not favor the proposed legislation, but if any is enacted it should be permissive in its character, simply giving the consent of Congress, with suitable limitations, to the erection of the necessary structures in navigable streams for the development of water power, this consent to be executed through the Chief of Engineers and the Secretary of War, to whom should be left entire control in the matter of plans and details. A draft of a bill embodying these views is submitted herewith for the consideration of the committee.

Very respectfully,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

By command of Brig. Gen. MACKENZIE:
[SEAL.]

FREDERIC V. ABBOT,
Major, Corps of Engineers.

[PUBLIC—No. 262.]

An Act To regulate the construction of dams across navigable waters.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when, hereafter, authority is granted by Congress to any persons to construct and maintain a dam for water power or other purposes across any of the navigable waters of the United States, such dams shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, or until they shall have approved such plans and specifications and the location of such dam and accessory works; and when the plans for any dam to be constructed under the provisions of this act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War: *Provided*, That in approving said plans and location such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that such persons shall construct, maintain, and operate, without expense to the United States, in connection with said dam and appurtenant works, a lock or locks, booms, sluices, or any other structures which the Secretary of War and the Chief of Engineers at any time may deem necessary in the interest of navigation, in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock, or other structures for navigation purposes, in connection with such dam, the person owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States a free use of water power for building and operating such constructions.

SEC. 2. That the right is hereby reserved to the United States to construct, maintain, and operate, in connection with any dam built under the provisions of this act, a suitable lock or locks, or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such an extent as may be necessary to provide proper facilities for navigation.

SEC. 3. That the person, company, or corporation building, maintaining, or operating any dam and appurtenant works, under the provisions of this act, shall be liable for any damage that may be inflicted thereby upon private property, either by overflow or otherwise. The persons owning or operating any such dam shall maintain, at their own expense, such lights and other signals thereon and such fishways as the Secretary of Commerce and Labor shall prescribe.

SEC. 4. That all rights acquired under this act shall cease and be determined if the person, company, or corporation acquiring such

rights shall, at any time, fail to comply with any of the provisions and requirements of the act, or with any of the stipulations and conditions that may be prescribed as aforesaid by the Chief of Engineers and the Secretary of War.

SEC. 5. That any persons who shall fail or refuse to comply with the lawful order of the Secretary of War and the Chief of Engineers, made in accordance with the provisions of this act, shall be deemed guilty of a violation of this act, and any persons who shall be guilty of a violation of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such dam and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such dam and accessory works as an obstruction to navigation at the expense of the persons owning or controlling such dam, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any dam under this act, the cause or question arising may be tried before the circuit court of the United States in any district in which any portion of said obstruction or dam touches.

SEC. 6. That whenever Congress shall hereafter by law authorize the construction of any dam across any of the navigable waters of the United States, and no time for the commencement and completion of such dam is named in said act, the authority thereby granted shall cease and be null and void unless the actual construction of the dam authorized in such act be commenced within one year and completed within three years from the date of the passage of such act.

SEC. 7. That the right to alter, amend, or repeal this act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions.

SEC. 8. That the word "persons" as used in this act shall be construed to import both the singular and the plural, as the case demands, and shall include corporations, companies, and associations.

Approved, June 21, 1906.

MEMORANDUM.

Certain questions which have had the consideration of the Inland Waterways Commission relate to rights of property and to the extent and power of the Federal Government in the premises under existing law. I submit the following remarks and quotations as having, to my mind, a bearing upon the questions raised.

These facts are presented not with a view of depreciating some of the suggestions which have been advanced as to the importance of Federal control in certain matters under consideration by the Commission, but as my view as to conditions under existing law as to ownership and as an expression of the thought that to accomplish some of the results considered important it would appear that modifications of law and possibly amendments to the Constitution may be necessary.

First, as to the land.—The title to the lands forming the banks and beds of navigable waters is in the several States by virtue of their inherent sovereignty, and their property and dominion in these areas are supreme, subject only to the general rights of commerce and navigation and the laws and regulations which Congress may make for the protection thereof. This doctrine was fully set forth by the Supreme Court of the United States in the case of Pollard's Lessee *v.* Hagan (3 Howard, 212), and has been reaffirmed in various subsequent decisions.

Lands under navigable waters belong to the States, subject to the rights surrendered by the Constitution to the United States. (Pollard *v.* Hagan, 3 Howard, 229.)

On admission of a State into the Union the shores of navigable waters lying below high-water mark pass to and are vested in the State, and thereafter Congress can not grant them. (Goodtitle *v.* Kibbe, 9 Howard, 477.)

The shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but are reserved to the States, and the new States have the same rights, jurisdiction, and sovereignty over the subject as the original States. (St. Anthony Falls Water Power Company *v.* Water Commissions, 168 U. S., 360.)

Ownership of and dominion over lands covered by navigable waters within States belong to the States, subject to the right of Congress to control navigation so far as necessary for the regulation of commerce. (Morris *v.* United States, 174 U. S., 216.)

In the leading case of Shively *v.* Bowlby (52 U. S., 1), the doctrine is exhaustively discussed, and the following is quoted from the conclusions of the court:

At common law the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and municipal government, may grant, for appropriate purposes,

titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future State when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

While some of the cases cited related to water courses where the tide ebbs and flows, which were the only water courses recognized in England as navigable, the doctrine enunciated is equally applicable to all the navigable waterways of the United States, and the court has so held.

The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and in this country such dominion, sovereignty, and ownership belong to the States, respectively, within whose borders such lands are situated, subject always to the right of Congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce. (Illinois Central R. R. Co. *v.* State of Illinois, 146 U. S., 387.)

In the *Genesee Chief* (12 Howard, 443), the court declared that—

the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense entitled to the denomination of navigable waters.

In Barney *v.* Keokuk (94 U. S., 324), referring to the State of Iowa, the court says:

It appears to be the settled law of that State that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially is it true with regard to the Mississippi and its principal branches.

Waterways which are classed as unnavigable are subject to no public easement in favor of the Federal Government, not even to that of commerce. That the States have absolute sovereignty with respect to the regulation and control of property rights in the lands forming the shores and beds of such waterways within their boundaries may be considered an admitted proposition that hardly needs assertion.

Where a river is not navigable in fact (unless reserved in the original grant) it is a private stream and the public has no easement in it. The riparian proprietors own the bed and may bridge the river, fence it, erect dams across it, and use the water for power or other purposes, provided they do not infringe upon the rights of those above or below them. (Gould on Waters, sec. 46; Farnham on Waters, sec. 29a.)

Streams which are not navigable in fact are not subject to public easement, and they can be made navigable only by the exercise of the power of eminent domain and the making of compensation for the easements acquired. (I Farnham on Waters, secs. 77 and 79; Cooley Constitutional Limitations (7th Ed.), p. 862.)

The doctrine of State ownership and control also applies to the public domain and lands owned by the United States.

A patent of the United States, conveying land lying upon the borders of a navigable river within the boundaries of a State, conveys no title to land lying under the stream, since the United States has no title thereto. (Scranton *v.* Wheeler, 163 U. S., 703.)

The power of Congress to make regulations for the sale and disposition of the public lands confers no right to grant land within a State which was below high-water mark in a navigable stream at the time the State was admitted into the Union. (Pollard *v.* Hagan, 3 Howard, 230.)

In the case of Hardin *v.* Jordan (140 U. S., 371), where the question arose whether a survey or patent of the United States bounded by a lake which was not navigable was limited by the margin or extended to the center of the lake, the court held that—

grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the State in which the land lies.

And the court further says:

With regard to grants of the Government for land bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and can not be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce.

The foregoing citations are from leading cases, a few only of the many that could be referred to. They are deemed sufficient, however, to show that the powers of the State over the soil forming the banks and bed of water courses, both navigable and unnavigable, are plenary so far as the title, disposition, and use of such areas are concerned, restricted only by the easement conferred by the Constitution on the Federal Government for the benefit of navigation and commerce.

Second, as to the water.—The rule of the common law is that every riparian owner has a right to the continued natural flow of the stream, and that this right is not a mere easement or appurtenance, but is inseparably annexed to the soil itself.

Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. Each proprietor may, therefore, insist that the stream shall flow to his land in the usual quantity at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its natural level. The proprietors have no property in the flowing water, which is indivisible and not the subject of riparian ownership, but may use it for any purpose to which it can be applied beneficially without material injury to others' rights, or for which the fall of the stream may make it available as a motive power. (Gould on Waters, sec. 204.)

Says Chancellor Kent (3 Kent Com. Sec., 439):

Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he can not unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.

This language has been quoted with approval by the Supreme Court, and is considered a correct statement of the common-law rule of riparian rights in flowing water which obtains in all the States of the Union that have adopted this rule. Each State, however, has the

power to change by statute the common-law rule as to streams within its borders, and in a number of States this has been done.

In the case of United States *v.* Rio Grande Irrigation Company (174 U. S., 690), the court say:

> Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes.

Regarding such legislation the court holds—

> that as to every stream within its dominion a State may change the common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise,

subject, however, to two limitations:

> First, that in the absence of specific authority from Congress a State can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial use of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

In the case of Kansas *v.* Colorado,the question presented for consideration and decision was whether the State of Kansas had a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith—or the State of Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow—or whether the matter was subject to the superior authority of the United States and consequently to national legislation, regulation, and control. The court discussed the whole question; sustained the validity of State legislation on the subject; and held that the rights of the States in regard to the flow of the Arkansas River were not subordinate to any superior right on the part of the National Government to control the system of the reclamation of arid lands, but—

> that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

The petition of intervention filed on behalf of the Government was dismissed by the court—

> without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River.

Following the line of this decision, the powers of the Federal Government may be more fully expressed as follows:

1. Paragraph 2, section 3, article 4, of the Constitution provides that—

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

By virtue of this provision of the Constitution the Federal Government has complete jurisdiction over the Territories, and—

> Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and therefore may legislate in respect to all arid lands within their limits.

As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override State laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if in the absence of a definite grant of power the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders.

As the owner of the lands bordering on water courses within the States, and either constituting a part of the original public domain or acquired for special purposes, the Federal Government has all the rights of a riparian proprietor under State laws, and may make all needful rules and regulations for the beneficial use of its property.

2. Section 8, article 1, of the Constitution provides, inter alia, that the Congress shall have power—

to regulate commerce with foreign nations and among the several States and with the Indian tribes.

By virtue of this provision the Federal Government has dominant jurisdiction over interstate commerce and its natural highways, and consequently the right and power to take all needed measures and to enact all legislation necessary to preserve, protect, and improve navigable water courses and to secure their uninterrupted navigability, even against any State action. In this regard its powers are supreme and exclusive, and for this purpose it may regulate and control the flow of water and occupy and use the underlying lands without liability to the State or the riparian owners.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution. (Gilman *v.* Philadelphia, 3 Wall., 724.)

Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. (Scranton *v.* Wheeler, 179 U. S., 141.)

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and, although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal Government by the Constitution. (Gibson *v.* United States, 166 U. S., 269.)

In a navigable stream the public right is paramount, and the owner of the fee of the land on either side of the stream or in its bed holds title subject to the paramount right of navigation over the waters of the river. (West Chicago Street Railroad *v.* Chicago, 201 U. S., 506.)

The foregoing pages are designed simply to indicate in a general way the respective jurisdictions of the Federal and State governments over the subject-matter. It is believed that the citations made are pertinent, and that they set forth clearly the general doctrine, as judicially enunciated.

It is suggested, however, that knowledge of State enactments are essential to complete information on the subject. The attitude of the several States differ materially—some adhere to the common-law rule of limiting the rights of a private riparian owner to high-water mark, reserving to themselves complete ownership below that point; others make private grants to low-water mark, and still others extend such rights to the middle of the stream without restrictions of any kind. A careful examination of the statutes of the various States will be necessary to ascertain the actual existing status of those property rights, with which the commission is concerned.

STATEMENT OF BRIG. GEN. GEORGE B. DAVIS, JUDGE-ADVOCATE-GENERAL, U. S. ARMY.

Mr. STEVENS. You are Judge-Advocate-General of the Army and the law officer of the War Department?

General DAVIS. Yes, sir.

Mr. STEVENS. You are familiar with the history, and especially the legal history, of the legislation as practiced with reference to the obstruction of navigable streams?

General DAVIS. Tolerably familiar with it.

Mr. STEVENS. Questions arrive constantly in your Department, do they not, and come under your supervision?

General DAVIS. Yes, sir.

Mr. STEVENS. What has been the practice of your office with reference to the right of the United States as to navigable waters in States or the boundary of States; that is to say, has your office assumed that the United States had the right of ownership in the waters of navigable streams?

General DAVIS. No, sir; it has not.

Mr. STEVENS. Are you familiar with this general dam act?

General DAVIS. I have read it and talked it over with General Mackenzie in connection with cases that have come under it.

Mr. STEVENS. And you are familiar with this Circular No. 14 that General Mackenzie referred to?

General DAVIS. Yes, sir.

Mr. STEVENS. Do you know of any power under the Constitution by which Congress can compel the owner of riparian property who desires to get the privilege of erecting a dam across a stream which borders on his property to pay for that privilege a revenue into the Treasury of the United States as a separate project of and by itself?

General DAVIS. No; I do not.

Mr. STEVENS. Do you know of any order by which he can be compelled to pay a revenue for the privilege outside of the taxing clause, so called, of the Constitution—I think it is section 8, article 2?

General DAVIS. No; I do not.

Mr. STEVENS. Is or is not that clause the only clause under the Constitution under which Congress must proceed to raise money to run this Government, by means of taxation?

General DAVIS. I should think so.

Mr. STEVENS. Do you conceive that the power to regulate interstate commerce can be used as a method of raising revenue to be turned into the general fund of the United States Treasury?

General DAVIS. I should not.

Mr. STEVENS. Do you think that if a navigable stream where Congress has granted the right to construct a dam, the dam is not constructed, or not finished within the time which Congress has provided that it shall be finished, that as a condition and where the dam will not be an obstruction as a matter of fact to navigation, so that no court would find as a matter of fact that it was an obstruction to navigation, and all that is needed is to receive the consent of the Government that the dam may be finished within some additional time, that that right or that privilege to be granted by the Government could be the basis of exacting compensation to be placed into the general Treasury of the United States to be used for whatever purposes Congress shall provide; you understand my meaning?

General DAVIS. I do. I should say no to that. In that bill there is a clause authorizing some imposition to be put upon the licensee to construct a dam.

Mr. STEVENS. That is in the general dam act.

General DAVIS. The general act.

Mr. STEVENS. That being true, is there or is there not any limit to the amount that can be exacted from the licensee for that privilege?

General DAVIS. I was going to explain my idea. That is new legislation. Suppose such a dam is authorized by Congress in the navigable waters of the United States at a place which is not now navigable in fact, but it may be necessary to make it navigable in the future, possibly at considerable expense. When that time comes, fifty years from now, seventy-five years from now, the present obstruction may be a simple obstruction to the prosecution of the work for the improvement of navigation which the Government may then intend to put in. Under one of the clauses I can conceive of such an imposition as will be calculated to reimburse the United States for the cost of taking out that obstruction; that is, that the Secretary, having regard to the public interest in the distant future—in section 1—

that in approving said plans and location such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that such person shall construct, maintain, and operate, without expense to the United States, etc.—

under that first clause, it is conceivable to me that such an imposition could be made as would in the course of the license or franchise furnish money enough to remove the obstruction. I have not thought it out; I just give it as it occurs to me.

Mr. STEVENS. Would there be any limit to the amount that could be exacted under that construction of yours?

General DAVIS. It is not a construction. In reading it over that just occurred to me. Otherwise the United States would have to blow this out at its own expense.

Mr. STEVENS. My point is this: That being true, is not the limit of the amount that could be exacted from the owner the amount that would be necessary to reimburse the Government?

General DAVIS. Unquestionably.

Mr. STEVENS. And no more could be exacted?

General DAVIS. No more. It goes on to provide for a somewhat different arrangement, after the words I have cited, by requiring the

owner or the licensee to do certain things which would make it necessary for the Government to do what I suggest.

Mr. ESCH. That would not be taxation, General.

General DAVIS. No, no; that is only a thought.

Mr. STEVENS. Does not section 5 provide, in substance, the same thing, "and in addition to the penalties above described?"

General DAVIS. That covers it fully. As I say, that was a mere thought in reading the bill, but the very words continuing make another and a broader provision to accomplish the same purpose as is contained in section 5.

Mr. STEVENS. So that the limit of section 1 would be, first, to prevent any obstruction, as a matter of fact?

General DAVIS. Yes, sir.

Mr. STEVENS. And if he makes any obstruction, to compel him to remove it at his own expense, or if the Government removes it, to reimburse the Government?

General MACKENZIE. General Davis and I had a little discussion on that point. I brought it up as to whether we would be at liberty to exact a bond or a certain amount of cash, simply to insure these matters.

Mr. STEVENS. Did you reach any conclusion?

General MACKENZIE. It was simply an informal conference. We thought that we would have that right.

General DAVIS. That conclusion would seem to be warranted.

Mr. HUBBARD. No question has arisen, has it?

General DAVIS. No, sir.

Mr. RICHARDSON. In the first paragraph of this general bill this language appears:

> That such persons shall construct, maintain, and operate, without expense to the United States, in connection with said dam and appurtenant work, a lock or locks.

Do you suppose the Government could ever make a contract with any private corporation where that would be in the contract?

General DAVIS. No, sir.

Mr. RICHARDSON. There you are.

Mr. STEVENS. I wanted to ask the General with reference to the construction of that second section of the enabling act of the State of Minnesota passed by Congress in 1857. You heard me read it, I think, and the substance of it is this:

> That the navigable waters leading into the same [that is, the State] shall be common highways and forever free as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

Does that mean by the State alone or does it also limit the authority of the Federal Government?

General DAVIS. I should think it would limit the authority of all who have powers in connection with interstate commerce.

Mr. STEVENS. If Congress passed that, can not Congress change that subsequently without the consent of the State?

General DAVIS. Change that?

Mr. STEVENS. Change the enabling act. Here is a grant by Congress.

General DAVIS. Yes, sir.

Mr. STEVENS. To a sovereign State of certain powers.

General DAVIS. Yes, sir.

Mr. STEVENS. Among them it provides that navigable rivers leading into the State shall be common highways and forever free as well

to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor. It does not say who shall have authority to control that thing.

General DAVIS. Yes, sir.

Mr. STEVENS. But it unquestionably binds the State.

General DAVIS. Certainly.

Mr. STEVENS. Does it bind Congress at the same time?

General DAVIS. I should think it did.

Mr. STEVENS. I have nothing further to ask the General.

General DAVIS. General Mackenzie and I were discussing this to see how it would work, and that proposition came up, and we stopped about there.

Mr. STEVENS. That is, on that circular No. 14?

General DAVIS. Yes, sir. I do not advance what I have said as an opinion; just as a thought which came into our minds during the discussion.

Mr. HUBBARD. You are speaking now of circular No. 14 or of your interpretation?

General DAVIS. It is not an interpretation.

Mr. HUBBARD. Well, it is a discussion of the statute. You are referring to your discussion; not to circular 14?

General DAVIS. Yes, sir.

Mr. STEVENS. Will you send us copies of your report?

General DAVIS. Yes, sir.

Mr. HUBBARD. At the conclusion of circular 14 is the statement that the draft of a bill embodying these views is submitted for the consideration of the committee. Noticing that, I inquired of General Mackenzie by letter whether a copy of that had been retained in his office. He says not; that the original was sent to this committee.

Mr. ESCH. It is probably in the files.

Thereupon, at 5 o'clock p. m., the committee adjourned.

WASHINGTON, D. C., *May 6, 1908.*

Hon. F. C. STEVENS,
Chairman Subcommittee on Interstate and Foreign Commerce, Washington, D. C.

DEAR SIR: I herewith hand you copy of contract between Province of Ontario and myself, dated January 9, 1905. This contract has been assigned to the Ontario Minnesota Power Company, which fact is a part of your present record before the committee. The provincial parliament of the Province of Ontario has extended the time for the completion of our power development to January 1, 1909, and has promised to make further extensions, if necessary.

I also herewith hand you copy of the approval of the minister of public works of the Dominion of Canada, Ottawa, of our plans for the development of our water power. This approval was made necessary as provided in the act of the Dominion of Canada, a copy of which you now have in your records. I think this now completes all the documentary evidence you have asked me to furnish you.

Very truly, yours,

E. W. BACKUS,
President Rainy River Improvement Company.

PAPERS RELATING TO THE RIGHTS, DUTIES, AND PROPERTY CONNECTED WITH THE PROVINCE OF ONTARIO.

To his honor the lieutenant-governor in council:

The undersigned has the honor to state that he has had under consideration certain amendments which have been suggested to the contract entered into between His Majesty the King, acting by the commissioner of Crown lands, and E. W. Backus and his associates, regarding the development of the water power at Fort Frances, in the district of Rainy River. At the time the former contract was entered into no plan had been prepared showing the location or character of the work proposed. These plans have since been prepared and submitted for approval, and the undersigned is of the opinion that it would be desirable to amend the contract by attaching a copy of the plan thereto and making it a part of the contract.

Another question has arisen in regard to the amount of power which should be reserved permanently for use on the Canadian side of the river. The former contract provided that one-half of the power capable of development should be reserved for use on the Canadian side of the river. It has been shown to the satisfaction of the undersigned that there are good grounds for objection to the clause being so framed. It will always be a matter of doubt as to what amount of power is being developed, and at some seasons of the year there will necessarily be more power than at others, and it has seemed best to the undersigned that a reservation should be made of a definite amount of power, with a proviso that when that amount is in use other power will be supplied, if required, according to the terms of the contract. The undersigned also notes that there is a clause in the contract providing that in default of the observance of any of the terms or conditions of the contract the Government may cancel the franchise, and purchasers of the power state that it will seriously interfere with the sale of their bonds if it be left open for all time to come whether or not the purchasers are complying with this clause. Any uncertainty on this point would be removed by fixing a definite amount of power to be permanently reserved, and the undersigned recommend that the reservation of power for use on the Canadian side be fixed at a minimum of 4,000 horsepower, with a provision for a supply of further power as set forth in the contract.

The undersigned has also had under consideration the clause of the contract dealing with the establishment of the power plant at Kettle Falls, if at any time in the future the government is of the opinion that a substantial and sufficient demand exists for power. By the contract the purchasers are given power to establish a storage dam at that point. It is urged on their behalf that at some date in the future the government may think there is a sufficient market for power but the purchasers may not, and as the former contract stood the default of the purchasers to erect a power plant at that point might result in the forfeiture of their entire undertaking, and it is pointed out that purchasers of the company's securities would be endangered by reason of the default of a comparatively minor point in the contract. The undersigned is of the opinion that in case of default on the part of the purchasers in the erection of a power dam, if so required by the Government, at Kettle Falls, the penalty for default by the purchasers should be limited to a cancellation of all their rights

at that point. It will be many years before such a demand could exist, and a large sum of money will in the meantime be expended by the purchasers on their undertaking at Fort Frances; and it would be inequitable, in the opinion of the undersigned, that the investment made by the purchasers and others who may become financially interested in the company should be endangered by such a default on a comparatively minor matter.

The undersigned has directed that a new agreement be prepared embodying these changes, bearing date of the 9th day of January, 1905, which has been executed by the undersigned on behalf of His Majesty the King, and by E. W. Backus, the purchaser, on behalf of himself and his associates, and the undersigned begs respectfully to recommend that such contract be approved and the execution thereof by him be confirmed.

A. G. MACKAY,
Commissioner of Crown Lands.

TORONTO, *January 13, 1905.*

COPY OF AN ORDER IN COUNCIL APPROVED BY HIS HONOR, THE LIEUTENANT-GOVERNOR, THE 13TH DAY OF JANUARY, A. D. 1905.

Upon consideration of the annexed report of the honorable the commissioner of Crown lands with reference to certain amendments which have been suggested to the contract entered into between His Majesty the King, acting by the commissioner of Crown lands, and E. W. Backus and his associates regarding the development of the water power at Fort Frances, in the district of Rainy River, the committee of council advise that the accompanying agreement embodying said amendments and in other respects to the same effect as the said contract, bearing date the 9th day of January, 1905, and which has been executed by the commissioner on behalf of His Majesty the King and by E. W. Backus on behalf of himself and his associates, be approved by your honor, and the execution thereof to the commissioner confirmed.

Certified.

D. LONSDALE CAPREAL,
Clerk Executive Council.

Description of land in the town plot of Alberton, now the town of Fort Frances, in the township of McIrvine, in the district of Rainy River, covered by the Fort Frances water agreement, dated January 9, 1905, between His Majesty, represented by the commissioner of Crown lands for the Province of Ontario, and Edward Wellington Backus.

All and singular those certain parcels or tracts of land and premises situate, lying, and being in the town plot of Alberton, now the town of Fort Frances, in the township of McIrvine, in the district of Rainy River, being composed of three parcels of land, containing in all $4\frac{7}{10}$ acres, more or less, and which parcels or tracts of land are more particularly described as follows:

This indenture made in triplicate this ninth day of January, A. D. 1905, between His Majesty, represented by the honorable the commissioner of Crown lands for the Province of Ontario (hereinafter called the "Government"), of the first part, and Edward Wellington

Backus, of the city of Minneapolis, in the State of Minnesota, lumberman, and those associated with him (hereinafter called the "Purchasers)," of the second part.

Whereas the Rainy River, in the district of Rainy River, forms the international boundary between the Province of Ontario, in the Dominion of Canada, and the State of Minnesota, one of the United States of America, which said river in the neighborhood of the town of Fort Frances forms a valuable and extensive water power.

And whereas the municipal council of the town of Fort Frances and the municipal council of the township of McIrvine and the residents of the said town and township have at various times petitioned the Government to develop or procure the development of the said water power, so that the same might be utilized for municipal purposes and for manufacturing and milling in the said municipalities, thereby assisting in the development of the said municipalities and of the surrounding district.

And whereas application has been made by the purchasers for a grant in fee of such lands adjacent to the said river, and of such lands covered by the said river, and of such privileges as are necessary to enable the purchasers to develop the said water power and to render the same available for municipal, manufacturing, and milling purposes.

And whereas the said water power can be more advantageously developed and more power produced by works embracing the entire width of the river and dealing with it as a whole than by an independent development on the Canadian side of the international boundary, and it is therefore in the public interest to adopt such plan of development.

And whereas the purchasers are the owners in fee simple of the lands and water power on the Minnesota side of the international boundary opposite the said town of Fort Frances, and are desirous of obtaining from the government of the Province of Ontario a grant in fee of the lands and power on the Canadian side of the international boundary for the purpose of developing the water power to the full capacity of the stream from side to side at high-water mark and of utilizing such storage facilities as may be available for maintaining the river at such high-water mark, thereby rendering available a large amount of power on the Canadian side of the river for municipal purposes and for the operation of pulp or paper mills, flour and grist mills, and other manufacturing establishments.

And whereas it is necessary in order to carry out such a scheme of development that the purchasers should be permitted to construct a storage dam at the outlet of Lake Namakan, at or near Kettle Falls, on the international boundary, and to set apart sufficient lands for the construction and maintenance of the said dam, and that they should also, if necessary, be in a position to create storage reservoirs on Upper and Lower Manitou Lake and Big Turtle Lake under conditions satisfactory to the Government by the construction of the necessary dams for that purpose, with the view of maintaining a more regular and uniform flow of water over the falls at Fort Frances by reinforcing the waters of Rainy Lake.

And whereas the construction of the said dams and the maintenance of the waters of Rainy Lake at a higher level during the low-water period will be of greater advantage to navigation

And whereas it is expedient and desirable in the interests of the town of Fort Frances, of the said township of McIrvine, and of the public generally, that the said water power be speedily developed to its full capacity and that an agreement be entered into to that end, upon the terms and subject to the conditions and stipulations herein contained.

And whereas the purchasers propose to form a joint stock company under the provisions of the Ontario companies' act, for the purpose of acquiring the said lands and water power and of taking over and acquiring this agreement and all the benefits and advantages appertaining thereto, and of assuming the obligations hereby incurred by the purchasers, and of carrying on the development and operation of the said water power.

Now this indenture witnesseth and it is hereby agreed by and between the purchasers and the Government as follows, that is to say:

1. The Government agrees to sell and the purchasers agree to buy the following lands and lands covered by water, being all and singular those certain parcels or tracts of lands and premises thereto, and being composed of the lands and lands covered by the waters of the Rainy River shown and set out in the plan and description hereunto attached, bearing the signature of the commissioner of Crown lands for Ontario, which said plan and descriptions are hereby made part of this agreement, the lands in question being colored red on the said plan, together with the lands or lands covered by water heretofore conveyed by the town of Fort Frances to His Majesty the King for the purpose of this agreement, together with all water powers and privileges, and all rights, easements, and appurtenances thereto belonging or appertaining, for and in consideration of the sum of five thousand dollars ($5,000.00) of lawful money of Canada, payable in cash on the execution and delivery of this agreement, and in further consideration of the covenants and requirements hereinafter contained and of the special agreement to supply power or electrical energy to the town of Fort Frances and the township of McIrvine, as hereinafter set out, to such an extent as the said town or township may require.

2. The purchasers covenant and agree to construct a dam, conduit, or such other works on or near the said river at Fort Frances, in accordance with the plans hereto attached sufficient to develop power to the full capacity of said river (including any increased capacity of said river by reason of the construction of storage dams or works), according to the plans hereto attached, approved of by the lieutenant governor in council, and which are hereby made a part of this contract, such dam to be built of solid masonry or concrete, and to be of such character and of such dimensions as will make the same amply strong and safe for the purposes intended, and such works will be of such design as will fully provide for sufficient waste weirs to obviate danger in time of floods or freshets. The dams, head gates, waste weirs, and works in connection therewith or incidental thereto shall not be proceeded with unless and until the plans, drawings, and specifications for the same shall have been submitted to and approved of by the lieutenant-governor in council, which said plans, drawings, and specifications shall show the precise site and location of the said work: *Provided, however,* That notwithstanding anything hereinbefore contained, and notwithstanding the approval of the plan hereto attached, the waters of Rainy Lake shall

not at any time be raised to a higher level than may be authorized by the government, and the height of water to be maintained in the said lake and the use or nonuse of the flashboards as shown on said plans shall at all times be subject to such control and direction by the Government as in the opinion of the Government may be necessary to ensure safety and protection of property.

3. All power houses and buildings, machinery and appliances necessary for developing the total power capable of development on the Canadian side of the said river, in accordance with said plans shall be erected as fast as required for use, and maintained on the Canadian side of the international boundary, provided that the plans and location of such power houses shall be subject to the approval of the lieutenant-governor in council.

4. The purchasers covenant and agree to commence the said dam and other works forthwith after the approval of the plans, drawings, and specifications by the lieutenant-governor in council, and to fully complete the said dam and works in accordance with said plans, drawings, and specifications by the first day of January, 1907, and to develop and render available for the use on the Canadian side of the river, by the said date, the total amount of horsepower to be capable of development, in accordance with said plans, at the said point (including increase in such power by reason of the construction and maintenance of storage dams or works), as provided in paragraph two hereof. And the purchasers further covenant and agree to expend upon such works the sum of fifty thousand dollars ($50,000.00) within nine months from the date hereof. *Provided*, That if the purchasers fail to erect the said dam and works and to render the said amount of power available on the Canadian side by the first day of January, 1907, or to expend upon the said works the sum of fifty thousand dollars ($50,000.00) within the nine months from the date hereof, as above provided, then this agreement shall be null and void, and all the moneys paid by the purchasers shall be forfeited.

5. The purchasers covenant and agree that they will from and after the said first day of January, 1907, deliver power to the said town of Fort Frances and to the township of McIrvine, by the method A, B, or C, hereinafter described, at the election of such municipalities or either of them for municipal purposes and for public utilities, but not for commercial purposes, which said power shall be kept constantly in operation and available twenty-four hours each day (save and except such time as may be necessary to replace machinery or for repairs), and the corporation shall have the right to elect to take power or any portion of it.

6. The purchasers further covenant and agree that they will at all times sell or rent and distribute to any person, firm, company, or corporation making application therefor, any power or energy reserved for use on the Canadian side of Rainy River and not already in use, at such prices and on such conditions as may be agreed upon between the parties, or in case of disagreement, at such prices and on such conditions as may be fixed by the lieutenant-governor in council.

7. It is further agreed by and between the parties hereto at the fixing of the maximum price herein provided for delivery of power to the said municipalities of Fort Frances and McIrvine forms a part of the consideration for this agreement, and for the transfer of the said lands, power, and privileges, and that the same shall not be used

to the prejudice of the purchasers in any reference to the lieutenant-governor in council to establish the price at which power shall be sold to other consumers, but the lieutenant-governor in council shall be at liberty to fix said prices at such figures as to him may seem just and proper.

8. It is further covenanted and agreed that they will at all times retain and reserve for use on the Canadian side of the international boundary line four thousand horsepower and will render the same permanently available for use on the Canadian side: *Provided further*, That when and so soon as the said four thousand horsepower so reserved shall be leased or in permanent use the purchasers will be leased to any person, firm, or company on the Canadian side and which may be unleased or not in permanent use.

9. The purchasers further covenant and agree that in leasing, selling, or otherwise parting with such power, or any portion thereof, they will provide by contract therefor that such power so leased, sold, or parted with, or any part thereof, shall not be farmed out or sold or leased at any greater price or remuneration than actually paid therefor to the purchasers, and the purchasers shall not sell or otherwise dispose of the said power in any way that would deprive the public of the benefits of the prices to be fixed or determined as herein provided.

10. The purchasers further covenant and agree that in no case shall lessees or users of power or energy on the Canadian side of the international boundary line be charged higher rates or be subject to more onerous conditions than users or lessees of like amount of power on the Minnesota side.

11. The purchasers covenant and agree that they will keep their work constantly in operation, so as to render power leased or sold by them available to the purchasers or lessees for twenty-four hours each day (save any except such time as may be necessary to replace machinery and for repairs).

12. The purchasers shall have the right to construct a storage dam at or near Kettle Falls at the outlet of Lake Namakan, and also at the outlet of Lower Manitou Lake and of Big Turtle Lake, subject to such regulations and conditions as may be imposed by the lieutenant-governor in council, and may raise the water of the said lakes to a point not higher than the high-water mark, as ascertained by an officer appointed by the government, and maintain them at such point, and the government agrees to lease to the said purchasers in perpetuity at a rental of one dollar per annum such an area of land as may be found necessary at or near the said Kettle Falls for the purpose of constructing the said storage dam and other necessary works or structures in connection therewith.

13. It is further covenanted and agreed that any matters of dispute not herein especially provided for between the purchasers and the said municipalities of Fort Frances and McIrvine, or between the purchasers and lessees or purchasers from them of water powers, shall be subject to the determination and direction of the lieutenant-governor in council.

14. It is further understood and agreed that this agreement and the sale to the purchasers is made subject not only to the terms hereinbefore specified, but subject also to the following terms and conditions:

(*a*) All the rights of the Dominion of Canada or the Province of Ontario as to navigation on the said river or rivers and the said

lakes, and to the improvement thereof by the construction of a lock or canal or locks or canals, or otherwise, are reserved and excepted, and the government of the Dominion of Canada or of the Province of Ontario shall have full power to enter upon the said land and premises and to construct, maintain, or repair any canal, lock, dam, or other work or works necessary or desirable for the maintenance and improvement of navigation upon the waters affected thereby, without let or hindrance, and without compensation.

(*b*) The right of timber owners and others is reserved to float logs and timber down the said river or rivers and lakes, for which purposes slides or other necessary works according to the plans approved by the government are to be constructed by the purchasers.

(*c*) The purchasers shall construct proper fishways if required by the proper authorities.

15. The purchasers covenant with the Government that they will not at any time or any place deposit, empty, run, or turn into, or permit to be placed, deposited, emptied, run, or turned into the said river or rivers, or the said lakes, any sawdust, chemicals, refuse, or matter of any kind which may have the effect of polluting the said waters, or of destroying, harming, or driving away the fish therein.

16. The Government agrees that as soon as the said dam at Fort Frances is completed and is in readiness for water wheels for one-half of the total quantity of power available for use on the Canadian side of the river, as hereinbefore provided, a patent from the Crown shall issue to the purchasers of the said lands and of the said power, subject to the forfeiture for breach of any of the conditions herein contained.

17. It is distinctly understood and agreed that the lands, rights, and privileges mentioned in this agreement are confined solely to lands, rights, and privileges the property of the Crown in Ontario under the control and administration of the government of Ontario, and that no permission is given hereby to the purchasers to overflow or cause to be overflowed any lands not the property of the Crown in Ontario and not under the control and administration of the said Government, and if damage is done by the erection of any dam or the construction of any works under this agreement, no recourse shall be had against the Government in respect thereof.

18. The joint stock company to be incorporated by the purchasers shall be composed of such persons and shall have such an amount of capital stock and such proportion paid up as shall be satisfactory to the Government. It shall assume all liabilities and engagements which are assumed and entered into herein by the purchasers, and the Government shall accept its personal liability instead of that of the purchasers in all respects, except the argeement to expend the first fifty thousand dollars ($50,000) as hereinbefore set out, and, except as aforesaid, the purchasers' liability shall cease and determine when such liability and engagements have been assumed by such joint stock company. It is understood and agreed that the purchasers shall give to Canadian lines of railway and steamboats the preference in the carriage of all goods and articles produced by them on the Canadian side of the said international boundary line, at such rates not higher than those charged by other lines or steamboats from or between the same point or points.

19. It is further understood and agreed that nothing herein contained shall affect the rights of the inhabitants of the town of Fort

Frances, or the township of McIrvine, or of the public, to free access to the shore and waters of the said Rainy River and Rainy Lake and the use of the said waters for municipal and domestic purposes, and that the purchasers shall not interfere with any street or streets now open, or that may be hereafter opened, to the said river, nor with any wharves, docks, or other structures now erected, or hereafter to be erected, for purposes of navigation, but excepting, however, from the operation of this clause the construction of such buildings and works as are authorized under the terms hereof.

20. It is further understood and agreed that failure on the part of the purchaser to carry out or comply with any of the conditions herein contained, or any order or direction of the government or the lieutenant-governor in council made hereunder, after due notice given and after a reasonable time has been given within which the purchasers may comply with the conditions in respect of which such default has been made, shall cause a forfeiture of the lands, rights, and privileges in this agreement mentioned, but the government may, at its option, require the payment of a penalty not exceeding one hundred dollars ($100.00) per diem while the default has continued.

21. This agreement shall be binding not only upon the parties hereto, but upon their heirs, executors, administrators, successors, and assigns.

In witness whereof the commissioner of Crown lands has hereunto set his hand and seal, and the parties of the second part have hereunto set their hands and seals.

A. J. MACKAY.

EDWARD WELLINGTON BACKUS. [SEAL.]

[Seal of Department of Crown Lands, Province of Ontario.]

Signed, sealed, and delivered in the presence of
GEO. W. YATES.

APPROVAL OF PLANS BY MINISTER OF PUBLIC WORKS, DOMINION GOVERNMENT, OTTAWA, CANADA.

[Extract from a report of the committee of the honorable the Privy Council, approved by the governor-general on the 19th of September, 1905.]

On a report dated 11th August, 1905, from the minister of public works, stating that in January, 1905, Mr. Edward Wellington Backus, of Minneapolis, made an application for himself and those associated with him under chapter 92 of the Revised Statutes of Canada, for the right to construct a power dam across the Rainy River from a point in the town plot of Alberta, now the town of Fort Frances, to a point in the city of Minnesota, United States, opposite the said town of Fort Frances.

The minister further states that with this application were also transmitted to the department of public works plans showing the nature of the work to be performed, one being a sketch showing the location and the other showing details of the mode of construction of the work.

The minister further states that on the 9th of January, 1905, the said E. W. Backus made with the government of the Province of Ontario a certain agreement whereby the applicants obtained from

the government of the said province a grant in fee of lands and power on the Canadian side of the international boundary for the purpose of developing the water power there and utilizing storage facilities with a view of creating a large amount of power for the operation of mills and other manufacturing establishments, the consideration of such acquisition being stated in the agreement at $5,000, the agreement in question containing several conditions as the honorable the minister of public works regards the character and dimensions of the works; the raising and maintaining of the waters of Rainy Lake; the use or nonuse of flashboards; the construction of power houses; the expenditure of $50,000 on the works within nine months from the date of the agreement; the delivery of power to the town of Fort Frances after the 1st of January, 1907, for municipal purposes and for public utilities; the operation and delivery of said power; the rate at which it shall be furnished; the intervention of the lieutenant-governor in council concerning the price of the power or energy to be created, and several other agreements of different kinds always bearing upon the delivery and price of the energy to be manufactured out of the works approved by the agreement.

That the agreement also in clause 14 thereof reserves and excepts all the rights of the Dominion of Canada in navigation and the improvement thereof by the construction of locks, dams, canals, and otherwise, the government of the Dominion or the Province of Ontario to have the power to enter upon the premises and maintain and repair such canals, locks, dams, or other works for the improvement of navigation without compensation. It is also agreed that no sawdust, chemical or other refuse of any kind shall be placed or deposited in the river, etc.

That the application so made by Mr. E. W. Backus, on behalf of the Ontario and Minnesota Power Company, was referred to the chief engineer of the department of public works for report and that the officer in question stated that in so far as the construction of the dam is concerned it would in no way interfere with navigation above or below the falls of Fort Frances, but would in fact be an improvement; that the dangerous rapids 2 miles above Fort Frances would be flooded, thereby improving materially the navigation; that the freshet waters stored in Rainy Lake could be let out during the season of low water, thereby also considerably improving the navigation of the river between Fort Frances and Lake of the Woods; and that the only objection that could be raised to the proposed elevation of the dam is provided for by a proposed revetment wall to be constructed by the company and also by a clause in the act of incorporation of the company which makes all damages to lands caused by their works a charge to be borne by them. The resident engineer quotes the opinion of the Chief Engineer of the United States Army, who says that the height of the dam appears to him unobjectionable provided that the said dam is operated so as not to reduce the flow of Rainy Lake during the low-water season.

That in addition to this report obtained from the engineer of the department of public works the matter was referred to the department of justice and that it reported that in so far as the Dominion government was interested in the proposed works it had to consider them in so far as they affected the navigation and in so far as they

affected the fishing and also in so far as they could affect an unfinished canal and lock at the place where the dam is to be erected.

That at the session of Parliament just closed the Ontario and Minnesota Power Company have obtained an act by which that company is authorized to construct and operate a water power now existing at Fort Frances and build all necessary works for that purpose, provided no work so authorized shall be commenced until plans thereof shall have been submitted to and approved by the governor in council. The act in question contains several clauses referring to the production of power or electrical energy, the delivery thereof, the construction of power houses, etc., the settlement of the price for power by the board of railway commissioners; a clause is also inserted to prevent the diversion of that energy for use in the United States without an order of the said railway commissioners, the board having full jurisdiction to inquire into the matter as often as necessary and to prescribe any action on the part of the company not inconsistent with the act passed, etc.

That on communication with them on the matter the department of marine and fisheries have sent to the department of public works a plan of the fishway which they think should be erected by the company in connection with their works, the said fishway to be built subject to the inspection and approval of an officer of the department of marine and fisheries.

The minister recommends, in view of the above application of the Ontario and Minnesota Power Company, of this agreement with the government of the Province of Ontario, a copy of which is hereto annexed, of the act passed by the parliament at its last session, and of the reports made by the chief engineer of the department of public works, and the report of the department of justice that authority be given to approve of the plans submitted by the said company, subject to the following conditions, viz:

First. That the company shall not in the execution of their works construct them in such manner that they will in anyway interfere with the navigation of the Rainy River either above or below the point where the works are to be constructed at any time during the session of navigation, and that they shall not increase the height of water either by the construction of the dam itself or by placing flashboards upon the said dam in such a way as to reduce the natural depth of water below said dam, nor generally will they interfere in anyway detrimental to the said navigation.

Second. That at any time during the construction of the works, or after their construction, or during their operation, the minister of public works shall have the power, when it shall appear to him necessary after a proper examination, to regulate the retention or flow of water by or over the dam; to enter on the works for such investigation, and also to have the right to make such regulations and issue such instructions as may to said minister appear advisable and necessary in the interest of navigation.

Third. That the permission be granted subject to the conditions inserted in the agreement between the government of the Province of Ontario and the applicants, and also subject to all the conditions and reservations expressed in the act of parliament passed at its last session respecting the Ontario and Minnesota Power Company, Limited.

Fourth. That no work will be done under the permission to be given to the company which will in anyway interfere with the lock, canal, or other works of a public nature already executed by the government of Canada, nor will any bridge or any other erection or construction of any nature whatsoever in, over, or across said lock, canal, or other works, be built nor generally shall any use be made thereof except by permission in writing given to that effect by the minister of public works.

Fifth. That no work for the construction of any dike or retaining wall provided on the plans submitted by the company shall be recommenced until the detailed plans thereof shall have been submitted and approved by the minister of public works.

Sixth. That should it appear necessary to the minister of public works during the course of construction of the works hereunder to be authorized to cause said works to be interrupted for any changes, alterations, etc., as to him may appear advisable, then the company will immediately cause the said works to be stopped forthwith and will carry out any alteration or changes which may be ordered by the said minister, and will conform in every way to the directions of the said minister.

Seventh. That the company shall provide in the execution of their works for the construction of the necessary fishway upon a plan and in a manner approved by the department of marine and fisheries, the officers of that department to have, for that purpose, the right of entering upon the work and seeing to the proper construction of the said fishway in accordance with whatever plans and specifications they may prepare.

The committee submit the same for approval.

JOHN J. MCGEE,
Clerk of the Privy Council.

HOUSE OF REPRESENTATIVES,
Washington, May 7, 1908.

Hon. F. C. STEVENS,
Chairman Subcommittee
Interstate and Foreign Commerce,
Washington, D. C.

DEAR SIR: I desire to call your attention to another important feature which has not been emphasized in relation to the water-power development on Rainy River, which your committee now has under consideration. In this development it is necessary to construct the power dam from the American shore to the Canadian shore, thereby making the construction of an international character. The development of this water power independently on the American side would be absolutely impracticable. The same would be true on the Canadian side.

Our engineers have estimated that not to exceed 1,000 horsepower could be developed on either side independently of the other, based on the average flow of the stream. In that case the cost of development would be so excessive, in proportion to the power developed, as to make the scheme entirely impracticable. Considering these facts,

and granting, if you please, for the sake of argument, that Secretary Garfield is right in his contentions on general principles, the question then arises in the case at hand, namely, what is the amount of power owned or controlled on the American side? Or on the Canadian side? The only reason that any considerable amount of power can be developed at that point at all is from the fact that our company has succeeded in securing the riparian rights on both the Canadian and American shores. Therefore I feel that under any circumstances this case should be dealt with special consideration and not in a general sense.

The Canadian governments, both Dominion and provincial, have considered this condition as most important in all their dealings with us in this matter. I respectfully ask that in your consideration of the matter you may weigh this feature with all others.

Very truly, yours,

E. W. BACKUS,
President Rainy River Improvement Company.

OFFICE OF THE CHIEF OF ENGINEERS,
UNITED STATES ARMY,
Washington, March 16, 1898.

Hon. R. A. ALGER,
Secretary of War.

SIR: I have the honor to return herewith a letter, dated the 1st instant, from the Committee on Interstate and Foreign Commerce, inclosing, for the views of the War Department thereon, H. R. 8351, Fifty-fifth Congress, second session, "A bill permitting the building of a dam across Rainy Lake River," and, in reply to its reference to this office, I beg to recommend certain amendments to the bill, which are indicated in italics in the copy of the same herewith submitted.

As thus amended I know of no objection to the passage of the bill by Congress so far as the interests of navigation are concerned.

Very respectfully, your obedient servant,

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

[H. R. 8351, Fifty-fifth Congress, second session.]

In the House of Representatives. February 18, 1898. Mr. Morris introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A BILL Permitting the building of a dam across Rainy Lake River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby granted to the Koochiching Company, its successors and assigns, to construct across the Rainy Lake River, at any part of the rapids in section twenty-seven, township seventy-one north, range twenty-four west of the fourth principal meridian in the

State of Minnesota, a dam, canal, and works *necessarily* incident thereto, for water-power purposes. The said dam shall be so constructed that *there* can at any time *be* constructed in connection therewith a suitable lock for navigation purposes: *Provided*, That the Government *of the United States* may at any time take possession of said dam *and appurtenant works* and control the same for purposes of navigation by paying the said company the actual cost of the same, but shall not do so to the destruction of the water power created by said dam *to any greater extent than may be necessary to provide proper facilities for navigation*: *Provided further*, That the works shall be constructed so as to provide for the free passage of saw logs. The said Koochiching Company, its successors and assigns, shall make such change and modification in the works as the Secretary of War may from time to time deem necessary in the interests of navigation, at its own cost and expense: *Provided further*, That in case any litigation arises from the obstruction of the channel by the dam, canal, or other works erected in connection therewith, the case may be tried in the proper Federal court of the United States in the district in which the works are situated.

SEC. 2. That the right to amend, alter, or repeal this Act is hereby expressly reserved.

SEC. 3. *That this act shall be null and void unless the dam herein authorized be commenced within two years and completed within four years from the date hereof.*

OFFICE OF THE CHIEF OF ENGINEERS,
UNITED STATES ARMY,
Washington, February 26, 1902.

Hon. ELIHU ROOT,
Secretary of War.

SIR: I have the honor to return herewith a letter, dated the 30th ultimo, from the Senate Committee on Commerce, inclosing, for the views of the War Department thereon, S. 3375, Fifty-seventh Congress, first session, "A bill relating to the construction of a dam across Rainy River."

By an act of Congress approved May 4, 1898, the Koochiching Company was authorized to construct a dam across Rainy Lake River, and by an act approved May 4, 1900, the time within which the dam was to be completed was extended to May 4, 1903. The bill under consideration proposes to further extend this time to May 4, 1907. It appears that the delay in the construction of the proposed dam has been unavoidable, and I know of no objection to the extension of the time as proposed by the bill.

The second section of the bill, however, introduces a new feature, in that it authorizes the company to raise the height of the dam for the purpose, as stated, of improving the navigation of Rainy Lake, and imposes upon the Secretary of War the responsibility for such construction of the works as will prevent injury from floods. It is not maintained by the company that the proposed building of the dam is for the purpose of navigation, and while such improvement may be

incidental to the construction, I am of opinion that such incidental benefit should not be made an argument for the work, and that the responsibility for any injury that may result therefrom should not be imposed upon the Secretary of War.

It is probable also that the raising of the waters of the lake to high-water mark will inflict injury upon the adjacent lands, and in my opinion the bill should expressly provide that the privilege granted shall not exempt the company from responsibility for such damage.

A copy of the bill amended in accordance with the views above expressed, is herewith, and, as thus amended, I know of no objection to its passage by Congress.

Very respectfully, your obedient servant,

G. L. GILLESPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

[S. 3375, Fifty-seventh Congress, first session.]

In the Senate of the United States. January 30, 1902. Mr. Nelson introduced the following bill; which was read twice and referred to the Committee on Commerce.

A BILL Relating to the construction of a dam across Rainy River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for the construction of a dam across the Rainy River by the Koochiching Company, its successors and assigns, as provided by chapter two hundred and thirty-eight of volume thirty of the Statutes at Large and chapter three hundred and forty-six of volume thirty-one of the Statutes at Large, is hereby extended to May fourth, nineteen hundred and seven.

SEC. 2. That the Koochiching Company, its successors and assigns, is hereby authorized to construct and maintain said dam, subject to the terms of said chapter two hundred and thirty-eight of volume thirty of the Statutes at Large, upon the plans now on file with the Secretary of War, or any modification of said plans which the Secretary of War may approve; [and for the purpose of improving the navigation of Rainy Lake,] the Koochiching Company, its successors and assigns, is hereby authorized to construct such dam at such height as will raise the waters of Rainy Lake to high-water mark: *Provided,* That said dam shall be furnished with such openings or gates or waste ways as will, [in the judgment of the Secretary of War,] carry the waters of the river at flood stage without raising the water higher than it would rise in the natural condition of the stream: *And provided further, That nothing in this Act contained shall be construed as relieving the Koochiching Company, its successors or assigns, from liability for any damage inflicted upon private property by reason of the raising of the waters of the lake as aforesaid.*

SEC. 3. That this Act shall take effect and be in force from and after its passage.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, January 13, 1905.

Hon. WM. H. TAFT,
Secretary of War.

SIR: 1. I have the honor to return herewith a letter, dated the 10th instant, from the Committee on Interstate and Foreign Commerce of the House of Representatives, inclosing for the views of the War Department thereon H. R. 17331, Fifty-eighth Congress, third session, "A bill relating to a dam across Rainy River."

2. An act of Congress approved May 4, 1898, as amended by acts of May 4, 1900, and June 28, 1902, authorized the construction of a dam across Rainy River by the Koochiching Company. The object of the bill now under consideration is to confer upon the Rainy River Improvement Company the rights and privileges granted to the Koochiching Company by the aforesaid act, and also to further extend the time for completion of the dam, the construction of which, it is understood, has been commenced.

3. Plans for the construction of this dam were approved by the Secretary of War under date of December 15, 1900, and I know of no objection to the transfer of the franchise and extension of the time for completing the structure, as proposed in the bill; but I beg to recommend that the bill be amended as indicated in italic on a copy of the same herewith submitted.

Very respectfully,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

[H. R. 17331, Fifty-eighth Congress, third session.]

In the House of Representatives, January 9, 1905, Mr. Bede introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A BILL Relating to a dam across Rainy River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Rainy River Improvement Company, a corporation organized under the laws of the State of Minnesota, for the improvement of the navigation of Rainy River and Rainy Lake, and its successors and assigns, upon filing with the Secretary of War proof satisfactory to him of its succession to the rights and privileges granted to the Koochiching Company by the following Acts of Congress, namely: Chapter two hundred and thirty-eight of volume thirty of the Statutes at Large, "An Act permitting the building of a dam across Rainy Lake River," approved May fourth, eighteen hundred and ninety-eight; chapter three hundred and forty-six of volume thirty-one of the Statutes at Large, "An Act to amend an Act entitled 'An Act permitting the building of a dam across Rainy Lake River,'" approved May fourth, nineteen hundred; chapter thirteen hundred and five, volume thirty-two, of the Statutes at Large, "An Act relating to the construction

of a dam across Rainy River," approved June twenty-eighth, nineteen hundred and two, shall have the right, subject to the restrictions, conditions, and terms of said several Acts, to construct and maintain the dam provided for therein: *Provided*, That such dam shall be completed on or before July first, nineteen hundred and nine.

SEC. 2. That upon filing the proof of its succession to the rights of the Koochiching Company, and the approval thereof by the Secretary of War, that officer shall issue to the Rainy River Improvement Company a certificate of such approval.

SEC. 3. That *the right to alter, amend, or repeal this Act is hereby expressly reserved.*

INDORSEMENT ON LETTER FROM HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, DATED JANUARY 29, 1908.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, February 13, 1908.

Respectfully returned to the Secretary of War.

The object of the accompanying bill, H. R. 15444, Sixtieth Congress, first session, is to extend the time for the completion of a dam across Rainy River, the construction of which was originally authorized by an act of Congress approved May 5, 1898. The time for completing the work has heretofore been extended by Congress.

It is understood that the dam is now under construction and that operations are being so conducted as to in no way interfere with navigation interests. I see no objection, therefore, to favorable consideration of the proposition set forth in the bill; but the adoption of certain minor amendments, indicated in italic in the bill, is suggested.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

[H. R. 15444, Sixtieth Congress, first session.]

In the House of Representatives. January 28, 1908. Mr. Bede introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A BILL Extending the time for the construction of a dam across Rainy River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for *completing* the construction of a dam across Rainy River for the Koochiching Company, its successors and assigns, or for the Rainy River Improvement Company, under chapter two hundred and thirty-eight of volume thirty of the Statutes at Large, as modified by *chapter three hundred and forty-six of volume thirty-one*, chapter thirteen hundred and five of volume thirty-two, and chapter seven hundred and ninety-seven of volume thirty-three of the Statutes at Large, is hereby extended to July first, nineteen hundred and twelve, subject to the provisions of the Acts aforesaid.

LETTER OF THE PRESIDENT.

THE WHITE HOUSE,
Washington, May 7, 1908.

MY DEAR MR. BEDE: While I stand absolutely for the policy with regard to the development of water powers announced in my message of February 26, because I believe that policy is just and in the interests of the whole people of the United States, still I am anxious that no injustice should be caused in this particular case in Minnesota which you have brought to my attention. At the time of my veto of the Rainy River dam bill I was not in possession of the information which has since come to me from you, that the dam is already about half completed under previous grants by Congress. That fact does not by any means remove Rainy River dam from the sphere of the new method of protecting the interest of the public, but it does warrant special consideration of the promoters of that project, because they have already expended part of their money under the old policy. There is, I believe, a simple way by which the interests of the people at large and of the Rainy River Improvement Company can be met at the same time, and that without in any degree sacrificing the policy for which I stand, or establishing any unfortunate precedents in connection with it.

There are two provisions without which I will not approve any bill granting the rights to develop water power on a navigable stream. The first is a definite limitation in time. That limitation can be made long or short, as the circumstances in each case require. In the present instance I suggest a term of ninety-nine years, which, I doubt not, will be abundantly sufficient for every need of the Rainy River Improvement Company. The second provision relates to a charge for the benefits obtained by any company as the result of the permission granted to it by the United States. In view of the fact that the Rainy River dam is reported to me as half built, I suggest that a specific provision be inserted in the bill fixing the time when the Secretary of War may begin to collect a charge at twenty-five years from the date of the passage of the bill. Thus the Rainy River Improvement Company will be relieved of an immediate charge which it had not anticipated, and at the same time the future interests of the people of the United States will be protected. If these two provisions can be inserted in the bill as passed, I shall be very glad indeed to sign it.

In reference to the claim that it is the State and not the nation which has power in connection with these waters, I would like to call your attention to the fact that as soon as the persons privately interested in these improvements get that position acknowledged they are absolutely certain to take the further position that the State itself has no power in the matter. For example, the Illinois legislature has been for twelve months fighting about measures for the improvement of the Des Plaines and Illinois rivers and the development of water powers to pay for the improvement, the private citizens who desire to use the waters in their pecuniary interest maintaining that the waters are the property of the riparian owners and can not be used by the State. It seems to me clear that the United States Government in cases where it can make or withhold

a grant according as it chooses can impose in connection with any grant it actually gives such conditions as may be necessary for the protection of the public. I do not see how there can be any question that it has the right to make the grant only for a limited time. Indeed, I can not imagine any argument being made against this proposition. As for the imposing of a charge, I can conceive of an argument being made that this can not be done. Nevertheless, it also seems to me absolutely clear that we have the right to do it.

In my judgment it is not a case as to whether the Constitution authorizes the action, but as to whether the National Government does or does not choose to take the position that, as a grant of this kind is an exclusive and therefore a monopolistic grant, it is fair that the holder, as a condition of the enjoyment, should give just compensation to the public at large, by whom, through the Government, that grant has been given. It seems to me unwise for Congress to take any other position. The greater the pecuniary gain to the holder of the grant, and the greater the value of the property by reason of this exclusive monopolistic right, the greater should be the compensation to the public at large. The compensation would be available for the use of the public, through the Federal Government, either in still further improving or aiding navigation, or in rebuilding the dam in case the company failed, or in removing an obstruction if it be an obstruction to navigation. It seems to me clear that the right to impose a compensation in any of these cases is an incident to the control which the Federal Government has over navigation, and which it can exercise either negatively by removing obstructions or affirmatively by improving navigation. Whether the United States itself constructs the dam or gives leave to construct it is to my mind wholly unimportant as regards the matter we have under consideration.

Sincerely, yours,

THEODORE ROOSEVELT.

Hon. J. ADAM BEDE,
House of Representatives.

Extract from speech of Hon. William Richardson, of Alabama, in the House of Representatives, March 28, 1908.

The House being in Committee of the Whole House on the state of the Union, and having under consideration the bill (H. R. 19158) making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1909—

Mr. RICHARDSON said:

I listened yesterday with a good deal of interest to the enumeration of measures recommended in the last message of the President of the United States by our very worthy and distinguished minority leader [Mr. Williams], whose leadership I have always followed without hesitancy and with confidence; but I am compelled, Mr. Chairman, by reason of the convictions that I have to enter my earnest protest and most respectfully dissent to one of the measures that he pointed out that is advocated by the President and about which the gentleman from Mississippi [Mr. Williams] spoke as follows: "One more

clause in the President's message meets with my unqualified approval. It is this:"

> Numerous bills granting water-power rights on navigable streams have been introduced. None of them give the Government the right to make a reasonable charge for the valuable privileges so granted, in spite of the fact that these water-power privileges are equivalent to many thousands of acres of the best coal lands for their production of power. Nor is any definite time limit set, as should always be done in such cases. I shall be obliged hereafter, in accordance with the policy stated in a recent message, to veto any water-power bill which does not provide for a time limit and for the right of the President or of the Secretary concerned to fix and collect such a charge as he may find to be just and reasonable in each case.

This is one of the measures that our minority leader pointed out that he cordially and unqualifiedly indorsed and "applauded," and it is to that measure that I shall address my remarks in the few minutes allowed me under the rules of the House governing debate at this time. It is but natural that the indorsement given this measure by our minority leader carries great weight with it.

I do not believe there is any question of authority or power between the Federal Government and the State governments on which the lines of demarcation are more thoroughly established and recognized than that in reference to the navigable streams of our country. I do not believe that the measure suggested by the President and indorsed by the gentleman from Mississippi [Mr. Williams] falls within the delegated powers of the Federal Government. I contend, Mr. Chairman, that at this particular time, when an impulse is pervading this whole country in reference to the improvement of our waterways and the development of water power as the only relief that can be given to the people of this country in the matter of transportation, because the capacities and the facilities of the railroads of the country are insufficient, that at this particular time of all other times in the history of our Government, this great movement for the improvement of our waterways and the development of the water powers should be inaugurated and prosecuted with a full recognition of the broad and constitutional limitations of the rights of the States and the Federal Government.

I know, and I will refer to them if I have the time in these short remarks, that there may be certain conditions or collaboration of work between the Government and individuals, where the improvement of navigation is in view, that a different rule would apply or may prevail; but the pronouncement of the President is sweeping against all conditions and asserts the unqualified power of the Government to impose, as a right, a rental charge on water powers. If the Government has a right and power to demand and collect a rental charge for the use of a water power—where the Government has never expended a cent to create that power—then it necessarily follows that the Government has a greater interest in our navigable waterways than that only of navigation. The unbroken line of decisions, from the establishment of our Government down to the present day, must be admitted to be this: That each State has the exclusive jurisdiction over the navigation of the waters lying within its territorial limits, and may therefore pass such laws regulating their use as it may deem wise, subject only to the supreme power of Congress to interfere for the purpose of preventing any obstruction or hindrance to navigation.

The State owns the fee to the bed of the navigable stream and the properties of such streams, and the State surrendered or delegated to the Federal Government the supreme right to use and control the navigation of these navigable streams. All other interests, functions, and properties in a navigable stream, whatever they may be, such as water power, water supply for domestic uses, and so forth, are held and exercised by the State, subordinate to the right that the Government has in navigation and navigation only. Therefore I say that any improvement made by a State or under the authority of the State must be in harmony with this principle. If such an improvement be made by the State, the Federal Government has the right to say what effect such improvement has on the navigation of the stream, and for this reason the consent of the Government ought to be secured. Consent can not be construed as giving the Government any other jurisdiction than it has under the limitations of the Constitution. Neither can an improvement or other building be placed on that navigable stream without the consent of the State.

It will be recalled that the great trouble in successfully operating our Government under the Articles of Confederation was the inability to control and regulate commerce between the colonies. When our Constitution was framed, and this trouble was provided for under Article I, paragraph 8, clause 3 of the Constitution, called the "commerce clause," from which the authority comes for the Government's supreme control over the question of navigation in our navigable streams, the wisdom of our fathers must be apparent when they caused the several States to vest in the Federal Government the regulation of commerce over the navigable rivers of the country. The Government has jurisdiction over navigation, not only on interstate navigable streams but on intrastate streams. We ought to hesitate before adopting any policy that tends even to contravene this wholesome and wise principle.

In Pollard *v.* Hagan, 44 United States, page 229, the relative rights of the United States and the State in the matter of navigable waterways is clearly declared:

> This report of eminent domain over the shores and soils under the navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty and deprive the States of a power to exercise a numerous and important class of police powers, but in the hands of the States can never be used so as to affect the exercise of any natural right of eminent domain or jurisdiction with which the United States have been vested by the Constitution.

In this connection I will refer to only a few of the large number of United States Supreme Court decisions sanctioning the views I express in these remarks:

Kaukauna Water Power Company *v.* Green Bay and Mississippi Canal Company (142 U. S., 254); St. Anthony Falls Water Power Company *v.* Water Commissioners of St. Paul (168 U. S., 360); Wilson *v.* Blackbird Creek Marsh Company (2 Pet. U. S., 245); Lake Shore Railroad Company *v.* Ohio (165 U. S., 365); United States *v.* Bellingham Bay Boom Company (176 U. S., 211); Levy *v.* United States (177 U. S., 621); Kansas *v.* Colorado (206 U. S., 46–87).

Where natural waterfalls exist in a navigable stream—and they exist in many places in our country—where the Government has not expended one dollar to create one ounce of water power, I deny that the Government has the right to demand or charge any citizen or corporation a rental for that water power after the citizen or private corporation has expended all needful money to utilize the natural, unharnessed electric energies of that natural fall. This would be in the nature of a tax, which the Government has no right to impose.

I submit in this connection the opinion of General Mackenzie, Chief Engineer of the United States Army, prepared in discussing this subject on February 23, 1906, daily Congressional Record, first session Fifty-ninth Congress, pages 2891 and 2892.

> In connection with legislation of this kind, careful consideration should be given to the question of limitations of the power of the Federal Government over navigable waters. By virtue of its power to regulate commerce Congress may exercise control over the navigable waters of the United States, but only to the extent necessary to protect, preserve, and improve free navigation. The Federal Government has no possessive title to the water flowing in navigable streams nor to the lands comprising their beds and shores, and hence Congress can grant no absolute authority to anyone to use and occupy such water and land for manufacturing and industrial purposes. The establishment, regulation, and control of manufacturing and industrial enterprises, as well as other matters pertaining to the comfort, convenience, and prosperity of the people, come within the powers of the States, and the Supreme Court of the United States holds that the authority of a State over navigable waters within its borders and the shores and beds thereof is plenary, subject only to such action as Congress may take in the exercise of its powers under the Constitution to regulate commerce among the several States.

And in this connection I take the liberty of referring to an extract from a letter written by Secretary of War Hon. W. H. Taft to the President, of the same date of the letter of General Mackenzie, in which he says:

> It is, of course, in the interest of the public that improvements of this kind should be encouraged, and in streams in which there has been no expenditure of money to create water power it does not seem to me necessary to extend the policy of demanding compensation for such a slight use of Government lands as this privilege.

I deny that where the Government has never spent a dollar to create a water power it has any right to go in and fix charges, and the references above made clearly sustain my position.

The State does not surrender its control of the bed of the river; it does not surrender other properties connected with the riparian interests; it only surrenders to the Government the navigation and the right to control navigation and the right to prevent it from being obstructed—it grants an easement—nothing more or less.

I say it is an important matter in this country to-day when this great movement is being inaugurated, and I regret to hear our minority leader say that he applauds and cordially indorses this proposition, which I believe is as complete an invasion of the reserved rights of the State as any that ever was suggested on the floor of this House, and utterly undemocratic.

I say that where there is a collaboration or coordination of work, where the Government says to the individual, "I will cooperate with you; I am looking to the improvement of navigation and you are looking to the development of water power; you are contributing by building the dam, and I will contribute so much in another way"—I do not pretend to say that under those circumstances the Government

has not a right to enter into terms. But that is collaborative work, I contend, and it is applicable especially throughout the South and the West.

There may be a navigable stream under those circumstances, and then, when these natural falls occur, does any man say that when their power may be used in promotion of enterprise and industry and thrift to advance our prosperity, to run our cotton mills and electric cars, that the President and the Federal Government has a right—the State never having surrendered its reserve right over that stream—to make a charge, to place a tax burden upon that power? And for what? To reap where it had not sown—never a dollar. What right has the Government to do it? Not certainly on the basis of sovereignty, because that is with the State. Upon what basis does our minority leader contend that such right is given to the Government under such circumstances to burden enterprise with such a charge and make the people pay for it?

It behooves us to look at this matter practically and make a practical application. It is useless to hold up the ordinary "scarecrow"—a monopoly. I assert without hesitancy that the "monopoly" will follow when you break down the constitutional limitations that safeguard these great tributaries that God dedicated to the use of the people who have the good fortune to occupy the lands through which they flow. The people, I tell you, Mr. Chairman, are not alarmed at this cry of greedy monopolies seizing and appropriating these great energies that have laid dormant and run to waste for unnumbered years of the past. We know, especially in the States of the South, what these water powers mean as allies of our future growth and prosperity. We have seen these great electric energies running to waste for years, while we well know if they were utilized, which they could be under a liberal policy, that they would run all the spindles of all the cotton mills of the South now and that would come to us in the future—they would run every wheel of industry in our State.

Electric railway lines propelled by this power would traverse our States, giving impulse to prosperity and wealth. Knowing these things and with such an experience we are not passive upon the suggestion of a policy that will fetter, hamper, and prevent the development of our water powers. The States reserved these rights for the individual benefit, comfort, and convenience of the people of the States, These rights that belong to the people of the States in navigable rivers are of the class of "police rights," and to encroach or infringe upon them by the Federal Government is as much a violation of the Constitution as to deny the State the right to pass criminal laws and provide penalties for the violation of the same. It would be equally excusable to deny, invade, or circumscribe the right of the State to provide for and protect the health of its people.

Under the contention made the Federal Government can, with equal right and propriety, require a rental charge of the sawmill that is located on the banks of a navigable stream. With same complacency a charge could be placed on the fish trap placed by the enterprising owner of the banks on one of the navigable rivers. It could demand that a water meter be used by all water companies that use water for domestic purposes from these navigable streams, so as to graduate or determine the amount the Federal Government is entitled

to for using the water of these navigable streams, regardless of whether navigation is affected or not. We have heard of vast coal beds that have been developed under the beds or bottoms of navigable rivers.

Of course, under the theory advanced by the President, the United States would have a right to collect a toll or rent charge or royalty off the coal mined, notwithstanding the fact that the fee of the bed of the stream belongs absolutely to the State—a property and a right that the State never delegated to the Federal Government. These are simply a few of the many practical wrongs that the people would be subjected to. And in the meantime our water powers would remain as they are now and just as they were when they fell from the plastic hand of nature—untouched, undeveloped, with millions of dollars daily running to waste.

The chiefest and most willing policy of the Federal Government should be to stimulate and encourage these water-power developments, not hinder them, for they mean increased prosperity. They mean the employment of thousands of unemployed laborers, who, if they remain unemployed, will soon become violators and disturbers of the peace. They mean larger population. I said in the beginning of my remarks that if the Government saw proper, in the interests of navigation, to enter into a collaboration or cooperation with individuals or private corporations for construction of dams or other works, where the Government and the corporation each contributed money for the building of the work, and the resultant benefits, then the question of what return in the way of charges the Government might be fairly entitled to is entirely a different matter from that announced by the President.

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